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LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1902.

PEARKS, GUNSTON & TEE, LIMITED v. WARD. HENNEN v. SOUTHERN COUNTIES DAIRIES COMPANY, LIMITED.

1902
April 22, 23.

Adulteration—Sale by Corporation—"Person"—Liability—"To the Prejudice of the Purchaser"—Knowledge of Purchaser—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 2, *sub-s.* 1.

The Sale of Food and Drugs Act, 1875, s. 6, enacts that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*.

Held, that a joint stock company incorporated under the Companies Acts can be convicted of an offence under s. 6.

Held, also, that a sale may be to the prejudice of the purchaser within s. 6, although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance, and quality demanded by him. The test is whether the sale would have been to the prejudice of a purchaser who had not that special knowledge.

PEARKS, GUNSTON & TEE, LIMITED *v.* WARD.

CASE stated by justices for the borough of Richmond, Surrey.

Three informations were preferred by the respondent against the appellants under s. 6 of the Sale of Food and Drugs Act, 1875, respectively charging them with having sold to the prejudice of the purchaser butter which was not of the nature, substance, and quality of the article demanded, the same having had water added thereto to the extent respectively of 8·7, 7·8, and 4·4 per cent. beyond the usual limit of 16 per cent. natural to butter.

Upon the hearing before the justices the appellants were convicted on each of the informations and fined.

The appellants are a limited joint stock company, incorporated under the Companies Acts, 1862 to 1898, and carry on business as grocers and provision merchants at, amongst other places, Richmond, Surrey, their registered office being in the City of London. The respondent is the agent of the Butter Association of 79, Mark Lane, London.

On April 30, 1901, the respondent caused one Annie White to purchase on his behalf at the appellants' shop at Richmond, half a pound of 1*s.* fresh butter, half a pound of 10*d.* fresh butter, and half a pound of 10*d.* salt butter for the purpose of analysis. Immediately after the purchase White handed the butter as she received it to the respondent, who divided each of the three pieces of butter into three parts, and fastened up each part in a grease-proof envelope. (1) The other requirements of s. 14 of the Sale of Food and Drugs Act, 1875, were duly complied with. A sample of each part was analyzed by the public analyst, who certified on May 4, 1901, that they contained respectively 24·7, 23·7, and 20·4 per cent. of water.

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(1) A question was raised by the case as to whether inclosing the samples in grease-proof paper was a sufficient compliance with the provisions of s. 14 of the Sale of Food and Drugs Act, 1875. The justices were of opinion that the section had been complied with, and the Court held that the question was one of fact for the justices. So much of the case as dealt with this question is omitted from this report.

There is no fixed standard as to the amount of water natural to butter, but it is generally understood that 16 per cent. should be the extreme limit. (1)

It was admitted by White that she understood that Pearks' butter was moist, and that she could see it was moist, but that she asked for butter and expected to get butter. It was also admitted by the respondent that he was not surprised, on seeing the result of the analysis, that the butter was adulterated with water, but that when the purchase was made he expected to get pure butter.

It was proved that the process of mixing butter with milk adopted by the appellants is to put the butter into a churn with full cream milk, and this is rechurned; any excess of water in the butter in question was derived solely from the milk so added during this process of blending. No water was separately added to the butter.

There was no evidence that at the time of sale the attention of the purchaser was in any way drawn by the appellants to the nature and composition of the article sold.

Objection was taken by the appellants to the summons on the ground that the appellants being an incorporated company were not liable to the penalties imposed upon "a person" offending against s. 6 of the Act, and that the actual seller was the person liable and should have been the person summoned, although he was the servant of the appellants and assisted in carrying on their business.

The justices overruled this contention, being of opinion that the appellants were, by virtue of s. 2, sub-s. 1, of the Interpretation Act, 1889 (2), included in the word "person" used in

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(1) By a Regulation of the Board of Agriculture, dated April 22, 1902, and made in exercise of the powers conferred by s. 4 of the Sale of Food and Drugs Act, 1899, it is provided that where the proportion of water in a sample of butter exceeds 16 per cent. it shall be presumed for the purpose of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the butter is not genuine by reason of the excessive amount of water therein.

(2) The Interpretation Act, 1889, s. 2, sub-s. 1: "In the construction of every enactment relating to an

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s. 6 of the Act, no contrary intention so as to exclude a body corporate therein appearing, and that the summonses were properly taken out against the appellants.

It was also contended by the appellants that there was no sale to the prejudice of the purchaser within the meaning of s. 6 of the Act, on the ground that at the time of purchase the purchaser knew what she was in fact buying, and knew that Pearks' butter contained more moisture than other butter, and was different to other butter.

It was contended by the respondent that there was a sale to the prejudice of the purchaser within the meaning of the section, inasmuch as the attention of the purchaser was not called to the nature and composition of the article sold.

The justices were satisfied and found as a fact that the purchaser did not know that the butter asked for contained such an excessive amount of moisture as was shewn by the analysis; that the purchaser received something different to that asked for, namely, butter plus something the nature of which was not disclosed at the time of sale. The justices were, therefore, of opinion that there was a sale to the prejudice of the purchaser within the meaning of s. 6 of the Act.

The questions for the opinion of the Court were: (1.) Does the word "person" in s. 6 of the Sale of Food and Drugs Act, 1875, include any incorporated company so as to make the appellants liable to the penalty imposed upon a "person" offending against the said section? (2.) Whether upon the facts stated there was a sale to the prejudice of the purchaser within the meaning of s. 6 of the Act?

Macmorran, K.C., and *Ricardo*, for the appellants. The convictions are bad upon two grounds. First, the appellants, being a corporation, are not a "person" within the meaning of s. 6 of the Act of 1875. The definition of "person" in s. 2 of the Interpretation Act, 1889, by which penal statutes are

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offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate."

made to apply to bodies corporate, is restricted to cases where no contrary intention appears in the statute itself, and upon a fair reading of the Act of 1875 a contrary intention is to be collected from it. In many of the sections the mental attitude of the accused is referred to. In ss. 3 and 4 the intention with which the forbidden act is done is expressly made an ingredient of the offence, and under s. 5 proof of absence of knowledge confers exemption from liability; these sections are incapable of application to a corporation, which cannot have a mens rea. And the proviso of s. 6 itself, exempting from the operation of the Act the addition of non-injurious substances required for the preparation of the food or drug as an article of commerce, where it is not done fraudulently to increase the bulk, &c., shews that the section does not apply to a corporation, which cannot commit fraud. The case of *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), where it was held that for the purposes of the Pharmacy Act, 1868, the word "person" did not include a corporation, is a strong authority in favour of the appellants, and the true principle to be applied is to be found in the judgments of Bramwell L.J. in the Court of Appeal, and of Lord Selborne in the House of Lords.

Secondly, the sale was not to the prejudice of the purchaser, who knew that the butter was moist, and only got that which she expected to get at the time she asked for the article in the appellants' shop. Where the purchaser has knowledge at the time of the sale that the article sold is not of the nature, substance, or quality of the article demanded, there is no sale to the prejudice of the purchaser, and no offence under s. 6 of the Act of 1875 has been committed: *Sandys* v. *Small.* (2)

Morton Smith, for the respondent, was only called upon to argue as to the liability of a corporation. There is nothing in s. 6 to shew an intention that the word "person" shall not include a corporation. It may be that under other sections of the Act, such as s. 3, a corporation cannot be proceeded against, because in those cases there must be proof of a criminal intent. But it has been decided that under s. 6 guilty knowledge is not

(1) (1880) 5 Q. B. D. 310; 5 App. Cas. 857.

(2) (1878) 3 Q. B. D. 449.

a necessary ingredient of the offence: *Betts* v. *Armstead* (1); and that a master is responsible for the acts of his servant: *Brown* v. *Foot*. (2) On the other hand, if the master prove that the servant was expressly prohibited, then the act is not within the scope of his authority, and the master is not liable: *Kearley* v. *Tonge*. (3) There is, therefore, no reason for inferring an intention that a corporation is to be excluded from the operation of the section.

Macmorran, K.C., in reply, cited *Abrath* v. *North Eastern Ry. Co.* (4); *Pharmaceutical Society* v. *London and Provincial Supply Association* (5); *Hotchin* v. *Hindmarsh*. (6)

HENNEN *v.* THE SOUTHERN COUNTIES DAIRIES COMPANY, LIMITED.

Case stated by justices for the borough of Southampton.

An information was preferred by the appellant against the respondents under s. 6 of the Sale of Food and Drugs Act, 1875, charging them with having sold to the appellant milk which was not of the nature, substance, and quality demanded, the said milk then containing 88 per cent. of added water.

Upon the hearing of the information an objection was taken on behalf of the respondents that the summons was bad upon the face of it, on the ground that the respondents, being a limited company, could not be summoned and dealt with for an offence of this nature under s. 6 of the Act.

The justices upheld the objection, and dismissed the information.

The question for the opinion of the Court was whether their decision was right in law or wrong.

G. W. Ricketts, for the appellant. Sect. 6 provides that "no person shall sell," &c. That is an absolute prohibition, the act being made universally unlawful; and where that is so, as was pointed out by Lord Selborne in *Pharmaceutical Society* v. *London and Provincial Supply Association* (7), the word

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(1) (1888) 20 Q. B. D. 771.
(2) (1892) 61 L. J. (M.C.) 110.
(3) (1891) 60 L. J. (M.C.) 159.
(4) (1886) 11 App. Cas. 247.
(5) 5 App. Cas. 857.
(6) [1891] 2 Q. B. 181.
(7) 5 App. Cas., at p. 866.

"person" must include a corporation, if the sale is made by a servant on behalf of the corporation. The language of s. 17 of the Sale of Food and Drugs Act of 1899, which provides that where the offence is committed by the personal act, default, or culpable negligence of the person accused, the punishment may be imprisonment, shews that the Legislature contemplated other cases in which an offence might be committed without any personal responsibility or actual knowledge on the part of the defendant.

The respondents did not appear.

LORD ALVERSTONE C.J. In the first of these two cases the appellants were prosecuted under s. 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser butter which was not of the nature, substance, and quality of the article demanded. It was contended that the summons could not be maintained against the appellants because they were a limited company. It was also contended that on the facts disclosed by the evidence there had been no sale to the prejudice of the particular purchaser in question, because, at the time the butter was purchased, the purchaser, and the person for whom she acted, knew that the appellants' butter contained more moisture than other butter, and was different to other butter. With regard to this latter point, the question, in my opinion, is not what is the actual knowledge of the particular purchaser, except in so far as that knowledge is derived from information given by the seller either by notice, by the nature of the article itself, or by what passed at the time of the purchase; the question is, What would be the position, not of a skilled purchaser like an inspector, but of an ordinary person purchasing the article without any special knowledge? Further, I do not think that it can be maintained that the admission by the purchaser, that she knew that the appellants' butter was moist, meant that she knew that the butter had more water in it than pure butter would have had; nor is it evidence on which the justices were bound to find that there had been no sale to the prejudice of the purchaser.

The main point in the first case, and the only point in the second case, is whether proceedings under s. 6 can be taken against a limited company. This question, in my opinion, depends upon very much the same considerations as those which arise in an ordinary civil action when it is sought to make a person responsible for the acts of his servants. I think that we ought to hold that a corporation may be liable under s. 6 unless mens rea is necessary in order to constitute the offence. The words of the section are that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds"; and the Interpretation Act, 1889, s. 2, sub-s. 1, enacts that in the construction of every enactment relating to an offence punishable on indictment or on summary conviction the expression "person" shall, unless the contrary intention appears, include a body corporate. I cannot see that any contrary intention appears in s. 6. The section deals with the sale of an article which is not of the nature, substance, and quality of the article demanded by the purchaser. The description of the article comes from the purchaser, and the sale is just as much a sale, if by a corporation, as if by an individual person. Therefore, unless it is clearly shewn that the case comes within that class of case referred to in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), in which it was held that no one could sell the article in question unless he had some particular personal qualification, as, for example, a licensed chemist or a qualified surgeon, I cannot see any intention that a corporation should be exempt. It is clear, however, that different considerations might apply in cases under ss. 3 and 4 of the Act of 1875, and also in cases under s. 17 of the Act of 1899.

It is not immaterial to observe that this defence has never been raised before this case; but I think that in principle the point is covered by the previous decisions. It was decided in *Betts* v. *Armstead* (2) that the want of guilty knowledge is not a defence to a charge under s. 6, and in *Brown* v. *Foot* (1) that a master may be made liable for a sale by his servant, and, therefore, it seems to me that any ground for drawing a distinction between a company and individual disappears. Therefore the protective object of the section and the necessary ingredients of the offence all seem to point to the conclusion that a corporation is placed in the same position as an individual, provided the sale is made on its behalf. The case of *Kearley* v. *Tonge* (2), where the servant was expressly prohibited, so that the act was not within the scope of his authority, and the master was therefore held not to be liable, seems to shew the analogy between this offence and the ordinary case of civil responsibility. For these reasons I come to the conclusion that there is no intention in the Act that the word "person" in s. 6 shall not include a body corporate, and it follows that a company may be made liable to a penalty under that section.

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(1) 5 App. Cas. 857.

(2) 20 Q. B. D. 771.

The appeal in the first case will, therefore, be dismissed, and in the second case allowed.

DARLING J. I am of the same opinion. With regard to the point that a corporation cannot be liable to a penalty under s. 6, we have in s. 2, sub-s. 1, of the Interpretation Act, 1889, the authority of Parliament for saying that the word "person" in this section includes a body corporate unless the contrary intention appears. For the reasons given by my Lord, I cannot see any intention here to exclude a company from the operation of the section.

With regard to the other point, it is said that there was no sale to the prejudice of the purchaser, because the woman knew that there was moisture in the butter, and also because she did not really want the butter which she bought. It is frequently argued in these cases that it must be proved by the prosecution that the sale was to the prejudice of the particular purchaser. I do not think that is the meaning of the section. I think the words "to the prejudice of the purchaser" are used in the sense that there is a sale to the prejudice of the

(1) 61 L. J. (M.C.) 110.

(2) 60 L. J. (M.C.) 159.

purchaser if a purchaser in the abstract would be prejudiced, although the actual purchaser may for some reason peculiar to himself not be prejudiced. Goods might be sold under a false description and might not inflict any actual injury, because they were in fact of a better quality than the goods demanded; but it was never intended that in such a case there should be a prosecution; and I think that is the reason why the words "to the prejudice of the purchaser" are inserted in the section. Provision is made in s. 13 for the purchase by inspectors of nuisances, officers of health, and other similar persons, of samples of food or drugs for the purpose of analysis, and if it were necessary to prove that the sale was to the prejudice of the particular purchaser, it never could be proved in such a case as that, because the purchaser is probably provided with money out of the public funds to pay for the article, and, however bad it may be, he is none the worse off, because the article is not intended to be used by him, but is to be analyzed. A person in that position cannot in the nature of things be prejudiced by the sale.

The protection afforded to the seller by the exhibition of a notice or placard, stating that what is sold is in fact a mixture of certain articles, is important, not as shewing what is in the mind of a purchaser, because in the case of an inspector he knows exactly what he is going to get, but because the protection to the vendor lies in this, that by means of a notice or placard he brings home to the knowledge of the purchaser the nature of the article which is being sold, and, therefore, there is no sale to the prejudice of the purchaser, either the actual purchaser or the purchaser in the abstract.

CHANNELL J. I am of the same opinion. As to the last point, I agree in substance with what Darling J. has said. There is an additional reason for making it clear what a sale to the prejudice of the purchaser means, because the way in which these cases are stated shews that attention is seldom directed to the real question, which is, whether a person without the special knowledge of an inspector, but who purchased under the same circumstances in other respects, would be prejudiced by the sale. It frequently happens that the justices do not find the facts necessary to determine that question.

With regard to the other and important question, whether a body corporate can be made liable under s. 6, I agree with what has been already said, but, having regard to the importance of the question, I will add a few words. By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of mens rea, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any mens rea or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation. If it does the act which is forbidden it is liable. Therefore, when a question arises, as in the present case, one has to consider whether the matter is one which is absolutely forbidden, or whether it is simply a new offence which has been created to which the ordinary principle as to mens rea applies. Applying this to s. 6 of the Sale of Food and Drugs Act, 1875, I think the matter is quite clear, for it has already been decided in at least two cases that there is an absolute prohibition of the particular sale mentioned in the section, and, consequently, there is no reason why the section should not apply to a corporation. In other words, the word "person" in s. 6 includes a corporation because no contrary intention appears.

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Channell J.

As to s. 3 there is a slight difference, because, reading s. 3 and s. 5 together, it seems that mens rea is involved in the offence, though it need not be proved by the prosecution, as it must in ordinary criminal cases. It is, however, so far an element in the offence that if the defendant succeeds in proving that he had no mens rea he is to be acquitted, the burden of proof thus being shifted from the prosecution to the defence. A provision of that kind is enacted where the Legislature desires to prevent the act from being done, though it is recognised that there may be cases in which the act is done innocently, and in which the person ought, therefore, not to be convicted. In those cases the defendant can prove his innocence; but, as it would be difficult for the prosecution to prove mens rea if the onus were upon them to do so in the ordinary way, the enactment is, consequently, framed in this particular way. There may, therefore, be more difficulty in applying the rule in those cases to a corporation than there is under s. 6. Speaking for myself, I am inclined to think that a corporation would come under s. 3 as well as under s. 6, but the question is not quite so clear, and possibly it may have to be argued hereafter. The decision of the present cases does not, however, involve a decision of that question. I agree with Mr. Ricketts' argument that s. 17 of the Act of 1899, which provides for the imprisonment of offenders in certain cases, assists his case, because it requires proof of something more than is necessary under s. 6, some personal act or culpable negligence on the part of the defendant, before imprisonment can be inflicted. If s. 6 had simply provided that imprisonment should follow a breach of the section, there might have been some difficulty in applying the section to a corporation.

Appeal in first case dismissed.
Appeal in second case allowed.

Solicitor for appellants in first case: *H. Nelson Paisley.*

Solicitors for respondent in first case: *W. T. Ricketts & Son.*

Solicitors for appellant in second case: *Prior, Church & Adams, for Linthorne, Town Clerk, Southampton.*

F. O. R.

SMITHIES, Appellant *v.* BRIDGE, Respondent.

1902
May 1, 2.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Article not of Nature, Substance, and Quality of Article demanded—Milk as taken from Cow deficient in Fat.*

It was proved on an information under the Sale of Food and Drugs Act, 1875, that the appellant, who was a milk-seller, supplied the respondent, an inspector under the Act, on being asked for new milk with a liquid which had been taken direct from the cow, and had not been tampered with or adulterated, but which, in consequence of the length of time which had elapsed since the cow had last been milked, was deficient in fat to an extent of 30 per cent., the remainder of the fat having been absorbed by the cow during the unduly long interval between the milkings.

Held (by Lord Alverstone C.J. and Channell J., Darling J. dissenting), that the appellant was rightly convicted of having supplied the respondent with an article which was not of the nature, substance, and quality of the article demanded by him.

Case stated by the Essex Quarter Sessions.

On October 7, 1901, the appellant, William Smithies, was convicted at a Court of summary jurisdiction, in the county of Essex, under s. 6 of the Food and Drugs Act, 1875, for that he did, on August 15, 1901, unlawfully sell to the respondent, John Thomas Bridge, to his prejudice, an article of food, to wit, milk, which was not of the nature, substance, and quality of the article demanded by the purchaser. On this conviction he was fined 20*l.* and costs. He appealed to the quarter sessions, and at the hearing of the appeal that Court affirmed the conviction, but reduced the penalty to 1*l.*, and stated this case for the opinion of the Court.

It appeared that on August 15, 1901, the respondent, who was an inspector under the Food and Drugs Acts, stopped a hand-cart on which was a churn of milk belonging to the appellant, and which was in the course of being sold, and asked to be supplied with a pint of new milk. He was accordingly supplied with that amount, and, having paid for it, he stated that he had purchased the milk for analysis, divided the sample, and otherwise complied with the requirements of the Acts.

The milk was submitted to the public analyst for analysis, and his certificate was in the following terms: "I am of opinion that the said sample contained the parts as under . . . . viz.:—only 2·09 per cent. of fat, and was therefore deficient . . . . in the fat proper to genuine milk, seeing that normal milk of even poor quality contains at least 3·00 per cent. of fat. No change had taken place in the constitution of the article that would interfere with the analysis."

This certificate was not disputed by the appellant, but it was proved that the cows from which the milk had been obtained had been milked at about 4 o'clock in the morning of August 15, and that the milk had not been tampered with or adulterated in any way, but was exactly in the same condition as it had come from the cows. It was further proved that the cows before the 4 o'clock milking had not been milked for nearly sixteen hours—that is to say, that they were last milked at about 12 noon on the previous day, and it appeared that the small percentage of fat in the milk was accounted for by the fact of this long interval between the two milkings, a portion of the fat of the milk during this interval of sixteen hours becoming absorbed by the cows. It also appeared that the owner of the cows had on divers occasions during the preceding eighteen months consulted with veterinary surgeons as to his cows having abnormally large calves, and the consequent loss and danger of loss of his cows in calving, and that he had been advised by the veterinary surgeons that it was due to the system of milking adopted, which, while having the effect of increasing the quantity of milk at the morning milking, caused it to be deficient in fat by reason of a portion of the fat in the milk while retained in the cows becoming absorbed by the cows and going to the nourishment of the calves.

The cows which supplied the milk in question were not the property of or under the control of the appellant, but belonged to a Mr. Lilley, from whom the appellant purchased the milk under a guarantee of its genuineness and purity as new milk. The appellant, however, did not desire to rely on s. 25 of the Food and Drugs Act, 1875, and did not give evidence of any compliance with the terms of that section.

The Court of quarter sessions held that there had been no adulteration of or abstraction from the milk, but considered that an offence under s. 6 had been proved.

Warburton, for the appellant. The conviction was wrong. There was no abstraction from or adulteration of the milk in question, nor was there any suggestion that the milking had been done with any improper motive. The milk was pure milk, as taken from the cows, and it must, therefore, have been of the nature, substance, and quality of the article demanded. On August 15, 1901, when the alleged offence took place, there was no standard of genuine milk, although by the Sale of Milk Regulations, 1901, issued by the Board of Agriculture, which came into operation on September 1, 1901, when milk contains less than 3 per cent. of milk fat, or less than 8·5 per cent. of milk solids other than milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875–1899, until the contrary is proved, that the milk is not genuine. The object of the Acts and of the order is to prevent the sale of an article which has been adulterated, and not to strike at the sale of a genuine article which is of inferior quality: *Hoyle* v. *Hitchman*. (1)

[LORD ALVERSTONE C.J. referred to *Lane* v. *Collins*. (2)]

C. E. Jones, for the respondent. The justices were right. The question for them was whether what the purchaser got was of the nature, substance, and quality of the article demanded. He asked for new milk, and the certificate of the analyst shews that what he got did not contain the ordinary constituent parts of new milk. No doubt the certificate of the analyst is not in itself conclusive: *Hewitt* v. *Taylor* (3); but it was confirmed by the evidence as to the way in which the cows had been treated, which shewed why the milk did not contain the ordinary proportion of fat. [He referred to *Dyke* v. *Gower*. (4)]

Cur. adv. vult.

(1) (1879) 4 Q. B. D. 233.

(2) (1884) 14 Q. B. D. 193.

(3) [1896] 1 Q. B. 287.

(4) [1892] 1 Q. B. 220.

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SMITHIES *v.* BRIDGE.

May 2. CHANNELL J. In this case the Court are not entirely agreed as to the result, but I think there is no real difference of opinion as to the principles to be applied. I proceed, however, to deliver my judgment first.

In this case the prosecution was instituted under s. 6 of the Sale of Food and Drugs Act, 1875. It is important to remember that, because that section differs very considerably from the other sections of the Act. It has been clearly decided that in cases under that section no question of guilty knowledge or fraudulent intent arises, but that the only question is whether the vendor has sold something which is not of the nature, substance and quality of the article demanded by the purchaser. The knowledge of the seller (what is called the mens rea) is not an essential element of the offence. (1) A master may be convicted of it where the sale is the act of his servant (2), and a corporation may be liable for the offence, as was decided in a recent case. (3) The principles which apply in such cases are laid down by the Lord Chief Justice in the case of *Goulder* v. *Rook* (4), where it was held that the innocent retailer of beer with which arsenic had been accidentally mixed was liable to be convicted under this section. That was a case of a manufactured article—beer; here we have a natural product—milk; and there is necessarily a certain difference between the two, but I think the same principle is applicable to both. The purchaser in this case came and asked for new milk, and if he got something which he would not expect to get under that description, then I think that the offence has been committed. In ordinary cases, if the vendor is able to prove that what he has sold as milk is without alteration and without any manipulation, the identical thing that came from the cow, then, in the absence of any other evidence, I think it must be held that what he sold was milk; but if the statement of the analyst shews that what was sold had not the proper constituent parts of milk, and if the seller were to prove that he had made inquiries and had discovered that the cow which had yielded the milk was ill, and that the milk was therefore not of its normal strength and richness, and was consequently not of its proper character, then that evidence would confirm the analysis and shew, as I think, that what he sold was not of the nature, substance, and quality of the article demanded. It is true that it would be the direct product of the cow; but the cow was not in fact producing milk, but was producing another liquid which did not contain the constituent parts of milk. In that case I think that the vendor, although acting in good faith and innocently, ought to be convicted under s. 6 for selling an article which was not of the nature, substance, and quality of the article demanded by the purchaser. No doubt it is a hard case, and the justice of the case would probably be met by a merely nominal fine, but I think that there must be a conviction.

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(1) See *Betts* v. *Armstead*, (1888) 20 Q. B. D. 771.

(2) See *Brown* v. *Foot*, (1892) 61 L. J. (M.C.) 110.

(3) See *Pearks, Gunston & Tee* v. *Richardson*, [1902] 1 K. B. 91.

(4) [1901] 2 K. B. 290.

Now, applying this to the present case, the magistrates have found that the milk in question was not of the normal and necessary strength, and they have also found that it came direct from the cow without being adulterated in any way. They have further found that this liquid, although it purported to be milk direct from the cow, was not of the nature, substance, and quality of milk. The magistrates find that as a question of fact, and it was within their province to do so. In my opinion they were entitled to come to that conclusion, and we ought not to interfere with their decision.

With regard to the case of *Lane* v. *Collins* (1), what Mathew J. there says is that it had not been shewn that the article supplied was other than the purchaser might expect to get as milk; that is to say, the facts there were found in the opposite way to that in which they have been found in the case before us.

No doubt, as I have said, this is a hard case, but if we do not lay down the rule in this way it seems to me that it may work mischief in other cases: where, for instance, the milk, though coming direct from the cow, is clearly infected.

DARLING J. I regret that I feel obliged to come to a different conclusion. In this case the purchaser asked for new milk, and he got milk just as it came from the cow. It is said that what he got was not of the nature, substance, and quality of the article demanded; if it was, of course he is not guilty. It seems to me clear that what he got was new, and the only question therefore is whether it was milk. Unless we can say that the liquid he got was not milk we cannot uphold this conviction. There is no doubt that it came direct from the cow and that it appeared to be milk. Of course, I understand by the word "milk" cow's milk, and I do not think that a person asking for milk would expect to get asses' milk, or that of any other animals. Nor do I think that milk from a diseased cow would come within the word, as, seeing that it is an article of food, the person asking for it must be understood to be asking for milk which is fit for human consumption. It is said, however, that this was not milk because it did not contain a certain proportion of essential fats. At the time of the alleged offence there was no fixed standard as to the proportions of water and fat to be contained in milk such as seems since to have been set up by the order of the Board of Agriculture. But if it was not milk, what was it? The certificate of the analyst says that milk usually contains such and such proportions of water and fat, and that this did not. But it is a well-known fact that some cows give milk that is richer in fats than others, and people keep particular kinds of cows for this very reason. In my opinion the vendor has supplied the purchaser with something which he was perfectly entitled to call milk. True, it was not so rich as other milk because of the manner in which the cows were milked; but I do not see how it is possible to say that what the purchaser got was not new milk, although, no doubt, it may not have been as rich as other milk.

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(1) 14 Q. B. D. 193.

I do not think that I should have taken the trouble to differ in this case if I thought that our decision would only apply to milk because of the departmental order to which I have referred; but I am afraid lest it should apply to other natural products, and I cannot help foreseeing the difficulties that might arise in such cases where no standard is in existence if it were to be held that a natural product was not of the nature, substance, and quality of the article demanded, because it did not contain all the elements, and in the same proportions in which those elements were usually present in normal examples of the natural product. In the case of other things than milk, I think it would be highly dangerous for us to lay down that a man may be convicted under s. 6 of the Sale of Food and Drugs Act, 1875, for selling a natural product in the state in which he gets it. For example, a purchaser who had demanded apples, and had received them as they were plucked from the tree, might complain that they contained less malic acid or other essential than some analyst might prove to be usual in apples. Poor in quality they might be—but they would still be apples and as nature produced them. So of this milk. I think, therefore, that this conviction ought to be set aside.

LORD ALVERSTONE C.J. This case is undoubtedly one of some difficulty; but, on the whole, I have come to the conclusion that we ought to affirm the conviction. The case comes before us in a somewhat peculiar way. The magistrates have found certain facts, and, on appeal, the Court of quarter sessions has affirmed their finding, but has reduced the fine imposed. If there is any evidence which would justify the magistrates in finding these facts, we cannot interfere with their decision. I agree with my brother Darling that the real question in the case is whether what was sold was milk. It is not necessary, as my brother Channell has pointed out, that the vendor should know of the condition of the article he sells —if it is not of the nature, substance, and quality of the article demanded, he is liable under s. 6, although he may know nothing about it. As no question of warranty arises here, we cannot distinguish between the appellant and Lilley, the man by whom the milk was originally provided. Now, is there any evidence on which the magistrates could find that the appellant has sold an article which was not of the nature, substance, and quality of the article demanded by the purchaser? The analyst's certificate shews that the milk that was sold did not contain that proportion of fat which milk ought to contain, and usually does contain. I agree that if the only other evidence were that the milk was taken direct from the cow, and if there were no evidence of anything abnormal in the condition of the cow or in the way in which it had been treated, it would have been wrong for the magistrates to have convicted the appellant; but it is here found as a fact that though the milk came direct from the cow, yet that its abnormal condition was due to the way in which the cow had been treated. The magistrates have found that the article supplied was not of the nature, substance, and quality of the article demanded, because it came from the cow in such a condition that it could not be described as milk at all. It is impossible, as I think, to say, having regard to the facts, that there was no evidence on which they could so find. As to the recent order of the Board of Agriculture, I do not think it purports to set up a standard of what is or is not genuine milk, but only means to say that the want of a certain percentage of fat is to be primâ facie evidence that the milk is not genuine, and it will still be open to the defendant to prove that the milk is genuine. If, however, the article produced, although it is produced by the cow, is the result of an abnormal condition of things arising either from disease, or, as here, from unusual treatment of the cow, I think that that does amount to evidence on which the magistrates can find that the article is not of the nature, substance, and quality of the article demanded. *Lane* v. *Collins* (1) may seem in conflict with this decision; but that case was decided on its own special facts, though I do not know that I should have agreed with the decision. It seems to me that a man asking for new milk is entitled to have an article which is not other than ordinary new milk by reason of any special way in which the cow has been treated. I think, therefore, that we cannot reverse the finding of fact by the magistrates, and that this appeal must be dismissed.

Appeal dismissed. Conviction affirmed.

Solicitors for appellant: *Speechly, Mumford & Co., for Prior, Colchester.*

Solicitors for respondent: *Jones & Son, Colchester.*

A. P. P. K.

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(1) 14 Q. B. D. 193.

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[IN THE COURT OF APPEAL.]

LENNOX *v.* STODDART.
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Gaming—House used for Betting—Receipt of Money elsewhere than at House—Coupon Competitions—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 5—*Gaming Act,* 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

In order that a case may come within s. 1 of the Betting Act, 1853, it is sufficient that a house or office has been used by the occupier for an essential part of operations carried on for the purpose of money being received by him as the consideration for a promise by him to pay money on events or contingencies of or relating to horse-races or other games or sports, although the receipt of the money did not take place at that house or office.

Sect. 5 of the Betting Act, 1853, is not repealed by s. 1 of the Gaming Act, 1892.

Stoddart v. *Hawke*, [1902] 1 K. B. 353, approved of.

Applications for judgment or a new trial in the above-mentioned actions.

The first action was tried before Wills J. and a jury. The parties to this action had agreed upon a statement of facts which was in substance as follows. The action was brought under s. 5 of the Betting House Act, 1853, to recover certain moneys paid by the plaintiff to the defendant's firm, J. Stoddart & Son, carrying on business at Middelburg, in the kingdom of the Netherlands, in respect of certain coupon competitions advertised by the defendant in his newspaper called *Sporting Luck*, and conducted in the manner hereinafter more particularly described.

The plaintiff having decided to enter the competition advertised in the said newspaper *Sporting Luck* on January 11, 1901 (a copy of which issue he had purchased from a news-agent), sent to J. Stoddart & Son at Middelburg aforesaid on January 14, 1901, his selections for that competition together with 6*l.* 8*s.* as required by the conditions of the competition. Other sums, as mentioned in the statement of claim, were

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remitted by the plaintiff to the defendant's firm at Middelburg aforesaid in respect of other competitions advertised in subsequent issues of *Sporting Luck*.

All the sums specified in the statement of claim, except the item of 2*l*. 5*s*. sent on March 8, 1901, were sent by the plaintiff in respect of competitions on the results of horse-races. The said amount sent on March 8 was in respect of a competition on the results of football matches.

From the commencement of January, 1901, to March 14, 1901, the defendant's firm, J. Stoddart & Son (which consisted of defendant and his son George Stoddart), was carrying on the before-mentioned competitions, which were known as "sporting coupon competitions," at Middelburg in Holland. Saving as is hereinafter expressly stated, the business of the said competitions was entirely conducted by George Stoddart at Middelburg aforesaid, while the defendant was engaged in carrying on the business of the said newspaper *Sporting Luck* at No. 10, Red Lion Court, of which he was and is sole proprietor. The defendant was during the same period the registered proprietor of the said newspaper, and he was also during the same period the occupier of No. 10, Red Lion Court, Fleet Street, London, E.C., at which office the said newspaper was edited and published. The said George Stoddart had no interest in the said newspaper, nor any interest in No. 10, Red Lion Court aforesaid.

The said newspaper *Sporting Luck* was printed under contract with the Argus Printing Company, Limited, for the defendant, and the same was chiefly devoted to racing and athletic topics, and as such had a large circulation apart from its connection with the said competitions. The contract for printing the paper was the same contract as was adjudicated upon in the case of *Stoddart* v. *Argus Printing Co.* (1)

All the said sporting coupon competitions (some of which were in respect of horse-races and the remainder in respect of football matches) were advertised in the defendant's newspaper *Sporting Luck*, and the conditions governing such competitions were fully set out in the advertisements. The nature of these competitions may be stated sufficiently for the purposes of this report as follows. A certain sum was advertised in respect of each competition as the amount of a prize to be given to the successful competitor, or distributed among the successful competitors, if more than one, in a guessing competition with regard to the result or results of a specified horse-race, or specified horse-races, or a specified football match, or specified football matches. Each copy of *Sporting Luck* provided a form called a coupon-sheet for each competition advertised, on which coupon-sheet a competitor might (if he so chose) fill in his selections. Such coupon-sheet was either printed on the newspaper itself, or it was provided on a detached slip, in which latter case the conditions were printed on the back, and the same was termed the "International Supplement." It was not obligatory on competitors to fill in their selections on the coupon-sheets. They were entitled to fill them in on plain paper, and, as a matter of fact, the plaintiff on two occasions late in February or early in March, 1901, sent in his selections, not on the printed coupon-sheets, but on plain paper. The purchase of the paper was not necessary to enable any person to enter any competition, nor did it give the purchaser the right so to enter, as the defendant's firm reserved the right, which was often exercised, of declining the selections and money of any particular person to whom they had an objection.

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(1) [1901] 2 K. B. 470.

With respect to the sale and distribution of the newspaper *Sporting Luck*, the orders for large quantities required by wholesale newsagents were forwarded to the Argus Printing Company and executed by them from their own offices, and it was in this way that by far the largest part of the sale and distribution of *Sporting Luck* and the competition coupon-sheets was effected. The smaller orders for the newspaper from newsagents were executed at or from No. 10, Red Lion Court, either on personal application or by post. In the case of any person other than a newsagent (of which there were very few each week) calling, and purchasing, or giving an order for the newspaper, although each copy of the paper contained (as aforesaid) a coupon-sheet, it was not known whether such person would or intended to become a competitor, or simply bought the paper on account of its general reading matter. In all cases the price charged for the newspaper containing the coupon-sheet, whether detached or not, was one penny and no more, and this was the same price as was charged when the newspaper contained no competition advertisement. When the detached coupon-sheet called the "International Supplement" was used, copies of such detached sheet could be obtained apart from the paper on application at No. 10, Red Lion Court, either personally or by post, as also could printed envelopes for the transmission of competition coupons to the firm's address in Holland, but no charge was made for them. The number of coupon-sheets distributed in this way formed a very small proportion of the total issued, scarcely 2 per cent. The only communications in fact actually received at 10, Red Lion Court aforesaid during the continuance of the said firm which contained any reference to the competitions were such as were, in accordance with a practice customary with many newspapers, to be answered amongst other communications in the answers to correspondents' column of the newspaper *Sporting Luck*.

Saving as herein otherwise appears, the whole of the business of the said competitions was conducted by George Stoddart at Middelburg, Holland, and not at No. 10, Red Lion Court. By the conditions of all the competitions each competitor was required to remit to Middelburg aforesaid to the firm of J. Stoddart & Son the sum of one penny in either of the authorized forms in respect of each one of his selections. Remittances could not under the said conditions be made otherwise than to the firm at Middelburg aforesaid. Competitors were not allowed to remit larger sums than were required for their selections, and the firm never opened accounts with competitors in respect of future competitions. All the money, very nearly the whole of which was in postal orders, was (including the amounts in respect of which the action was brought) sent by competitors direct to Middelburg, Holland, by post in accordance with the requirements of the advertised conditions of the competitions, and such money was received there by George Stoddart on behalf of the firm. No such money was or

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would have been received at No. 10, Red Lion Court, or elsewhere than at Middelburg.

On receipt by George Stoddart at Middelburg as aforesaid and within the prescribed time of the money and selection sent by any person in respect of any competition, the contract between defendant's firm and such person was complete, and he at once became a competitor in such competition, and entitled to a share in the sum offered, if his selection should be successful, except in cases where the intending competitor (being considered of an objectionable character) was refused participation, and in such cases it was notified to such person by return of post that he was not accepted as a competitor, and his money or post-office order was at the same time returned to him.

All English postal orders and English cheques received at Middelburg during January and up to and including February 18, 1901, were sent back from Middelburg to England addressed direct to the defendant's bankers in London, who got the same cashed and credited the defendant with the amounts, but they were never transmitted to this country until long after the events, the subjects of the competitions, had been decided. For instance, the postal orders received at Middelburg on January 15 for the first contest which the plaintiff entered were not despatched to the defendant's bank till the evening of January 29, arriving in London on January 30, by which time the events, the subjects of the competitions in respect of which the last-mentioned postal orders had been remitted, had been determined nearly a fortnight previously, namely, on January 16 and 18. It was necessary that the postal orders and cheques should be retained at Middelburg after the events had been determined so that the postal orders and cheques could be checked with the names of the winning competitors, and so that in case of a dispute within the time specified in the conditions they could be referred to. None of the said postal orders nor any other remittances in any form whatever were ever sent to No. 10, Red Lion Court, or received by the defendant personally in this country.

In respect of English postal orders and English cheques received at Middelburg after February 18, 1901, the practice was slightly altered, as, after the same had been counted and the names of the competitors taken, and after the time specified for the lodging of complaints had expired, they were taken by George Stoddart to Messrs. Wiebant, bankers in Flushing, where the defendant's firm had opened an account under the style of A. J. Stoddart, and were not sent back to this country by George Stoddart or any one else connected with the defendant at all. Messrs. Wiebant purchased the said postal orders and cheques from the firm at a price, and gave the firm immediate credit for the amount of the purchase-money. Messrs. Wiebant subsequently remitted the said postal orders and cheques as their own property to Messrs. Blydenstein, their agents in London, for collection.

The English stamps received from competitors were dealt with by being attached at Middelburg aforesaid to the English postal orders and realized along with them in the manner aforesaid. The English postal regulations permit stamps to the value of 5*d.* to be thus dealt with. Bank notes received were always retained at Middelburg aforesaid and utilized for the purpose of paying (as far as they would go) successful competitors. The balance of the notes and all the coin required to pay successful competitors were obtained from the firm's Middelburg bankers.

All postal orders and cheques, whether made payable to J. Stoddart or otherwise, requiring signatures prior to realization were signed by a person (usually George Stoddart) authorized so to do by the firm at Middelburg aforesaid before being sent to England or sold to Messrs. Wiebant, as the case might be.

Prior to March 14, 1901, successful competitors got payment of the money payable to them by sending registered envelopes addressed by and to themselves to the office No. 10, Red Lion Court. Such envelopes were then sent in one parcel to Middelburg aforesaid, and checked there, and remittances in cash and notes were then inclosed, and taken back from there by a messenger to the General Post Office, London, where they were registered and despatched by him, and receipts obtained for the same. The reason for this procedure was that the Netherlands postal authorities would not take the envelopes because they contained coin.

The firm of J. Stoddart & Son was dissolved on March 14, 1901, and the dissolution was gazetted in the *London Gazette* of March 19, 1901. The last transaction the plaintiff entered into was on March 11, 1901. After the dissolution the competition business was carried on by George Stoddart. Throughout the year 1901 down to March 14 no money paid in respect of the said competitions was in any shape received by the firm elsewhere than in Middelburg aforesaid, and except as expressly stated above nothing connected with the said competitions was done at 10, Red Lion Court aforesaid.

Upon the facts above stated the learned judge directed the jury to find a verdict for the plaintiff, and gave judgment accordingly for the amount claimed.

In the second of the above-mentioned actions, which was tried before Darling J. and a jury, the plaintiff sued under s. 5 of the Betting Act, 1853, to recover moneys paid by the plaintiff to the defendant, Ada Jane Stoddart, as money received by the defendant for the use of the plaintiff. The defendant in her statement of defence pleaded (inter alia) that the plaintiff's claim was in respect of a contract by way of gaming and wagering, and which was therefore void under the Gaming Acts, 1845 and 1892.

The defendant was, between the month of October, 1899, and the month of November, 1900, the registered proprietor of a newspaper called *Sporting Luck*, which was published weekly at an office at 10, Red Lion Court, Fleet Street, in the City of London, of which office the defendant was the occupier.

The plaintiff had paid to the defendant the sums sought to be recovered in the action in respect of coupon competitions of a character similar to those described in the statement of facts in the first action, and which were carried out through the medium of the newspaper *Sporting Luck* by a system similar to that employed in the first case, with the exception that the money was paid at the office instead of being paid at Middelburg in Holland. The jury answered certain questions put to them by the learned judge in favour of the plaintiff, and the judge upon further consideration gave judgment in his favour for the amount claimed.

Danckwerts, K.C., and *G. H. Stutfield*, for the defendant in the first action. This is in effect an appeal from the decision in *Stoddart* v. *Hawke*. (1) There is no enactment which makes betting, or the occupation of a bookmaker, per se illegal. The Betting Act, 1853, is directed against the keeping and using of houses by persons for the purpose of betting there with persons who resort thereto for that purpose: *Reg.* v. *Brown* (2); *Powell* v. *Kempton Park Racecourse Co.* (3) It is submitted that, in order that a case may come within s. 1 of the Betting Act, 1853, and the following sections, the house must be kept for the purpose of making bets there with persons resorting thereto, and the receipt of the money must be in the house alleged to be kept or used in contravention of the Act. Here no persons resorted to the defendant's office in Red Lion Court for the purpose of there making bets, and the money was received in Holland. The betting contract was not effected till the receipt of the money there. The mischief aimed at by the statute was the keeping of houses at which bets were made by the deposit of money as the consideration for a promise by the keeper of the house to pay the bet, if the event was decided in favour of the depositor. Here the deposit of money takes place abroad, and the bet is made there, not at the office in Red Lion Court. A person cannot, without straining the meaning of words, be said to keep or use a house for the purpose of receiving money unless he receives the money at the house. The words of the second part of s. 1 of the Betting Act, 1853, must be read as if the word "there" or the words "at such house, office, room, or other place" were inserted after the words "for the purpose of any money or valuable thing being received." The mere fact that advertisements as to the competitions and coupons for the insertion of selections by competitors are issued from the office will not bring the case within the Act. An office from which a bookmaker carries on the business of betting by means of correspondence, and to which no one resorts for the purpose of betting, would not be within the Act: *Reg.* v. *Brown.* (1) There is no force in the suggestion made in the argument in *Stoddart* v. *Hawke* (2) that, if the defendant's contention were correct, then a person might evade the Act by keeping a house for the purpose of making bets with persons resorting thereto, and directing them to pay the deposits on the bets made next door. In such a case the house at which the deposits were paid would clearly be a house kept or used in contravention of the Act.

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(1) [1902] 1 K. B. 353.
(2) [1895] 1 Q. B. 119.
(3) [1899] A. C. 143.

[They also cited *Davis* v. *Stephenson* (3) ; *Cox* v. *Andrews.* (4)]

Cohen, K.C., and *R. W. Turner*, for the plaintiff. The case clearly comes within the second part of s. 1 of the Betting Act, 1853. A house or office may be used for the purpose of money being received by the keeper of the house, although the money is not received at the house; and there is no ground for inserting in the enactment words which are not in it. The so-called coupon competitions were substantially bets, or at any rate they involved the receipt of money by the defendant as and for the consideration for a promise by him to pay money on the event of a horse-race or football match. It is clear upon the facts that the system by means of which these competitions were carried out was to a large extent worked at and from the defendant's newspaper office in Red Lion Court. That office was really used for the purpose of enabling the defendant to make bets with the public. If that office was used as an essential part of the machinery by means of which the defendant received the money which was paid in Holland, the words of the section are satisfied. The case of *Davis* v. *Stephenson* (3) has really no bearing on the present case. In that case the occupier of licensed premises allowed a bookmaker who had received deposits on bets outside the premises to deposit the money so received by him on the licensed premises, and it was held that under those circumstances it could not be said that the premises had been used for the

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(1) [1895] 1 Q. B. 119.

(2) [1902] 1 K. B. 353.

(3) (1890) 24 Q. B. D. 529.

(4) (1883) 12 Q. B. D. 126.

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purpose of the bookmaker's receiving the money. There is no analogy between that and the present case, for there the money had already been received before it was deposited on the licensed premises. If the case comes within s. 1 of the Betting Act, 1853, it follows that the plaintiff is entitled to recover the moneys paid by him to the defendant as money received by the defendant for the plaintiff's use under s. 5 of the Act.

Montague Shearman and *G. H. Stutfield*, for the defendant in the second action. First, these coupon competitions are not transactions which come within the purview of the Betting Act, 1853. They are not bets in the proper sense of the term. They are guessing competitions, involving skill and judgment, in which a competitor pays a penny per guess. It is submitted that it sufficiently appears from the preamble and from the terms of ss. 1, 4 of the Betting Act, 1853, that what was aimed at by that Act was the suppression of betting-houses at which bets in the ordinary sense of the term were made. It may be that the words of the second part of the 1st section of the Act are wide enough taken literally by themselves to cover these competitions; but the sense of those words ought to be restricted by reference to the general purview of the Act. The decision in *Reg.* v. *Stoddart* (1) is not consistent with those in *Stoddart* v. *Sagar* (2) and *Reg.* v. *Hobbs* (3), and ought not to be followed.

Secondly, s. 5 of the Betting Act, 1853, is by necessary implication repealed by s. 1 of the Gaming Act, 1892, and therefore the action will not lie. It is enacted by the last-mentioned section that any promise, whether express or implied, to pay any person any sum of money paid by him under any contract or agreement rendered null and void by the Gaming Act, 1845, shall be null and void, and no action shall be brought or maintained to recover any such sum of money. The action under s. 5 of the Betting Act, 1853, is clearly an action on such an implied promise as falls within the very terms of s. 1 of the Gaming Act, 1892.

(1) [1901] 1 K. B. 177.
(2) [1895] 2 Q. B. 474.
(3) [1898] 2 Q. B. 647.

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Avory, K.C., and *R. Nevill*, for the plaintiff, were not called upon to argue.

VAUGHAN WILLIAMS L.J. I will deal first with the case of *Lennox* v. *Stoddart*. In my judgment the appeal in that case fails. I do not propose to deal with the case at any great length, for really all that I have to say will be little more than a paraphrase of what was said in the Divisional Court in the case of *Stoddart* v. *Hawke*. (1) The question is as to the true construction of s. 1 of the Betting Act, 1853, and more particularly of the second part of that section. The section is as follows: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise."

It is said with regard to the second part of that section that the words "for the purpose of any money or valuable thing being received" ought to be read as if they were followed by the word "there" or the words "at such office." I cannot agree with that contention. I agree with the view taken by the Divisional Court in *Stoddart* v. *Hawke* (1) with regard to the construction of those words. Lord Alverstone C.J. said in that case: "I think that, having regard to the preamble of the Act, and the judgments in *Powell* v. *Kempton Park Racecourse Co.* (2), the section is to be understood as prohibiting the keeping of a house for the purpose of the receipt of money, wherever that receipt may be, and that it would

(1) [1902] 1 K. B. 353.

(2) [1899] A. C. 143.

defeat the obvious intention of the Legislature if after the words 'for the purpose of any money or valuable thing being received' we were to read in the words 'at that house.'" Darling J. said substantially the same thing. Channell J., in a passage which I propose to read, stated the point in a concise and forcible manner. He said: "It has already been decided in *Reg.* v. *Stoddart* (1) that this coupon system is a system whereby the owner of the premises receives money as the consideration for a promise to pay thereafter money in certain events. But that does not conclude the question whether the present case comes within the statute, because what has to be determined is whether the business conducted by the defendant is localized, and for that reason rendered illegal. What is done here is that there is an office in this country from which are issued newspapers with an appendix to them called coupons. In my opinion those documents are an essential part of the system, and without them the money cannot be received. I do not think it is necessary that the actual receipt of the money should take place in the office. What is forbidden is the use of the house for 'the purpose' of money being received, and I think the house is used for that purpose when there is done in it the thing which is the foundation of the whole transaction resulting in the receipt of money." I do not propose to deal at length with the statements contained in the agreed statement of the facts. The result of these may, as it seems to me, be very plainly stated. In my judgment the defendant kept this office substantially for the purpose of the receipt of deposits on bets, which he proposed to make with depositors residing in England. He desired to get these deposits before and to hold them at the time when he made the bets. For this purpose he devised this system of what he called sporting coupon competitions. He issued these coupons from a "newspaper," office, which was in my opinion a mere name with which he chose to clothe the office kept by him for the purpose of carrying out these transactions, in which he really made bets with the depositors of money upon sporting events. He did not wish to have the coupon filled in with the competitor's selections together with the money sent to the office in Red Lion Court. He therefore said to the would-be competitors that they must, as part of his system, get one of the coupons which were issued from his office, and send it, together with the proper amount of money in proportion to the selections made, to Middelburg, and that, on that being done, he would bet with them, and retain as deposit the money which was so lodged with his agents abroad in the first instance, but which would from them come back to him in this country. Such being manifestly the true facts of the case, it seems to me clear that the issuing of these coupons from the office in this country was really a material and necessary step for the purpose of the receipt of the money by the defendant, and therefore that there was a use of this office for the purpose of money being received within the terms of s. 1 of the Betting Act, 1853. I think that, if we were to say that, because the money in this case was paid in the first instance at Middelburg, the case was not within that section, we should be equally bound to say that, if the coupons had been issued with directions to the persons to whom they were issued to pay the money to any person other than Stoddart at any place he chose to select, that case would not be within the Act, although the person so receiving the money might be the agent of Stoddart to receive it with the coupon for the express purpose of handing it over to Stoddart. For the reasons given by the judges in the Divisional Court in *Stoddart* v. *Hawke* (1), I am of opinion that the case comes within s. 1 of the Betting Act, 1853, and that the appeal must be dismissed.

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(1) [1901] 1 K. B. 177.

I will now proceed to deal with the case of *Davis* v. *Stoddart*. It was argued for the defendant that the transaction there in question was not a bet in the ordinary sense, and that the Betting Act, 1853, only deals with bets properly so called. It was admitted that the transaction came within the literal meaning of the words of the section, but it was suggested that the meaning of the words ought to be limited in some way, so as to confine it to what are called bets in the ordinary sense of the word. It does not appear to me that anything was urged which ought to induce us to limit the meaning of the words of the section as suggested. Then it was argued that the effect of s. 1 of the Gaming Act, 1892, was to operate as a repeal of s. 5 of the Betting Act, 1853. The argument was put thus. It was said that betting was a contract by way of gaming and wagering; that the effect of the Gaming Act, 1892, was to render it no longer possible for a party to such a contract to recover money paid by him in pursuance of it as money received for his use; and that the effect of s. 5 of the Betting Act, 1853, was merely to enable persons who had deposited money under a contract by way of gaming and wagering to recover that money upon an implied promise as money received for their use. The answer seems to me to be plain. The action under s. 5 of the Betting Act, 1853, is not an action which is brought upon any contract whether express or implied. It is an action which a person is enabled to bring by the very terms of the section. It is a statutory action as much as an action given by a statute for the recovery of a penalty. That being so, it seems to me impossible to hold that the effect of s. 1 of the Gaming Act, 1892, is to repeal s. 5 of the Betting Act, 1853, or to prevent the action sanctioned by that section from being maintainable. For these reasons I think that the appeal in this case must also be dismissed.

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(1) [1902] 1 K. B. 353.

ROMER L.J. I am of the same opinion. It was contended that these coupon competition transactions do not come within the scope of the Betting Act, 1853, because they do not constitute bets in the proper sense of the term. In my opinion, they are really bets; but, even assuming that they do not constitute bets in the strict sense of the term, they seem to me to be transactions which come within s. 1 of the Betting Act, 1853; for they are transactions under which money is received as or for the consideration for an assurance, undertaking, promise, or agreement to pay thereafter money on an event or contingency of or relating to a horse-race or other game, sport, or exercise. They come therefore within the very words of the second part of the section, and, to my mind, they are clearly within the mischief aimed at by those words. That being so, we have to consider whether, upon the true construction of that part of the section, these transactions are carried out in such a manner as to bring the case within its terms. In my opinion, they clearly are so carried out. When one looks at the contents of the so-called newspaper *Sporting Luck*, and the nature of these coupons, and the other circumstances of the case, it appears to me plain that the defendant used the office in Red Lion Court for the purpose of carrying on there this business of coupon competitions, and that the chief part of that business was transacted there, though a part of the business was transacted abroad. The place was undoubtedly an office: it was used by the occupier of it; and that use of it by him was within the very words of the second part of the section, for it was used by him for the purpose of receiving money as or for the consideration for an assurance, undertaking, promise, or agreement to pay money on events or contingencies of or relating to horse-races or other games, sports, or exercises. It was said that the case was not within the section, because it ought to be implied from the terms of the section that the receipt of the money must be at the office. But the section does not say so, and, to my mind, there is no reason why this Court should insert into the section words which are not to be found in it. Such a limitation of its meaning is not necessary in any way for the protection of the public, or to prevent the operation of the section from being too wide, it being already restricted by the provision that the receipt of the money must be on behalf of the owner, occupier, keeper, or other person as aforesaid. On the other hand, if we were to insert any such words as are suggested, we should be going a long way towards rendering the operation of the section nugatory, by affording an obvious method of evading its provisions. Such being, in my opinion, the true construction of s. 1, I come to s. 5. Undoubtedly the defendant is within s. 5 if the case comes within s. 1, for he is "such a person as aforesaid," and has received the money "as or for the consideration for an assurance, undertaking, promise, or agreement as aforesaid." That being so, the plaintiff is clearly entitled under the words of the section to recover from the defendant the money which he so received. That disposes of the first action.

The questions in the second action are covered to a great extent by the observations which I have already made, and I desire only to add a few words to what my Lord has said with regard to them. I do not think that s. 5 of the Betting Act, 1853, is repealed by the Gaming Act, 1892. The plaintiff who sues under s. 5 is not, to my mind, in any sense suing on the gaming contract or on any term of it, either express or implied, but in respect of a statutory right conferred by the section. It is clear, in my opinion, that it was never intended to abrogate that statutory right by the general provision of the Gaming Act, 1892. I agree that the appeal in that action ought also to be dismissed.

MATHEW L.J. I am of the same opinion. The Betting Act, 1853, was no doubt directed against the practice of keeping houses or offices for the purpose of betting. It was argued that there was a difficulty in bringing the case within s. 1 of the Act on the ground that the transactions involved in it were not betting transactions, and that keeping a house or office for the purpose of such transactions was, therefore, not keeping a house of the class against which the provisions of the Act were directed. The transactions in the first case were carried out thus. Advertisements were issued in the defendant's newspaper, giving notice of the amount available for the purpose of the competition, and of the events to which it was applicable; and coupons were issued from the office of the newspaper in which were to be inserted the selections made by the competitors to whom they were issued, or in other words the amount to, and the events on, which they were willing to bet in respect of the race or races which formed the subject of the competition. The money payable on the selections was not to be paid at the office, but was transmitted to a place on the Continent to an agent of the defendant; but in some form or other the money would of course come back again to the defendant in this country. The transaction appears to me to be as plainly a bet as it could possibly be. If the whole of the transaction had taken place at the office in this country, as it did in the second case, I think it would have been impossible for any reasonable person to come to any other conclusion than that the defendant kept and used this office for the purpose of betting. It was urged that we ought to put such an interpretation on the words of s. 1 of the Betting Act, 1853, as would exclude this particular transaction from its operation; and that, the words in fact being merely "for the purpose of money being received," we ought to insert after these words some such words as "at such office." But one must give the framers of the Act credit for being possessed of ordinary intelligence. It is manifest that, if those words were inserted, the Act could be evaded at once. If the enactment were confined to cases in which the money was received at the office kept for betting, it would be easy to defeat the objects of the Act by arranging that the receipt of the money should take place elsewhere. I think that the framers of the Act purposely abstained from inserting any such words as those suggested for obvious reasons. The intention of the Legislature is clear, and we should be going out of the way to defeat that intention if we were to alter the phraseology of the section in the manner suggested. In my opinion, the case comes within the words of s. 1 of the Betting Act, 1853, as being one in which the defendant kept and used an office "for the purpose of money being received as or for the consideration for an assurance, undertaking, promise, or agreement to pay money on events or contingencies of or relating to horse-races."

As regards the second case, the observations which I have already made as to the applicability of s. 1 of the Act of 1853 to these transactions also apply to that case. A further point was made, namely, that s. 5 of the Betting Act, 1853, had been impliedly repealed by s. 1 of the Gaming Act, 1892. The liability imposed by s. 5 of the Betting Act, 1853, appears to me to partake of the character of a penalty. Many years after the passing of that Act, in consequence of the case of *Read* v. *Anderson* (1), and, in order to meet the decision in that case,

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(1) (1884) 13 Q. B. D. 779.

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the Legislature passed the enactment contained in s. 1 of the Gaming Act, 1892. I cannot agree that the provisions of that section were intended to repeal s. 5 of the Betting Act, 1853, which relates to an altogether different subject-matter.

Applications dismissed.

Solicitors for plaintiffs in first action: *Alpe & Ward.*
Solicitor for defendant in first action: *C. B. Peachey.*
Solicitors for plaintiff in second action: *Malkin & Co.*
Solicitor for defendant in second action: *W. B. Glasier.*

E. L.

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May 8.

[IN THE COURT OF APPEAL.]

GATES v. R. BILL & SON.

Hackney Carriage—Negligence of Driver—Liability of Proprietor—Relation of Master and Servant—London Hackney Carriages Act, 1843 (6 & 7 *Vict. c.* 86), *ss.* 2, 28, 35—*Metropolitan Public Carriage Act*, 1869 (32 & 33 *Vict. c.* 115), *s.* 6.

The defendant and her son were partners in the business of cab proprietors in London. A cab belonging to the partners, which was let in the ordinary way to a cabman, through his negligence came into collision with another vehicle, in which the plaintiff was riding, whereby injuries were occasioned to the plaintiff. The licence for the cab was taken out in the name of the defendant's son, who appeared on the register of licences as the proprietor thereof. In an action by the plaintiff against the defendant in respect of the injuries occasioned to the plaintiff as aforesaid:—

Held, that the action was maintainable, on the ground that the liability imposed in such cases on cab proprietors, by virtue of the Acts relating to hackney carriages, is not confined to licensed proprietors, or that the defendant must be considered as being a licensed proprietor in respect of the cab.

APPLICATION for judgment or a new trial in an action tried before Ridley J. with a jury.

The action was for personal injuries occasioned to the plaintiff as after mentioned.

The appearance entered in the action was "by Rebecca Bill, trading and sued as R. Bill & Son, the defendant in the action."

It appeared that, through the negligence of the driver of a cab licensed to ply in the metropolis, the cab came into collision with a vehicle in which the plaintiff was riding, and personal injuries were thereby occasioned to the plaintiff. The licence for the cab under the Metropolitan Public Carriage Act, 1869, was taken out in the name of Harry Bill, who appeared on the register of licences as the proprietor thereof. Harry Bill was the son of the defendant Rebecca Bill. The jury found that there was a partnership between Rebecca Bill and Harry Bill, her son, in the business of cab proprietors (1), and that Harry Bill was registered proprietor of the cab in question on behalf of the firm. It appeared that the cab was let to the cab-driver from day to day in the ordinary way to be employed by him free from control, he having to pay so much per day to the proprietors, and retaining any surplus for himself. The jury assessed the damages at *55l.*, and Ridley J. entered judgment for the plaintiff for that amount.

Avory, K.C., and *W. H. Moresby*, for the defendant. The decisions shew that in such a case as the present the relation of master and servant would not at common law, and independently of statute, exist between the cab proprietor and the cab-driver: *Fowler* v. *Lock* (2); *King* v. *London Improved Cab Co.* (3) Therefore the defendant could only be liable, if at all, by virtue of the Hackney Carriage Acts. In the case of *Powles* v. *Hider* (4), and in the more recent cases of *King* v. *London Improved Cab Co.* (3) and *Keen* v. *Henry* (5), the liability of the cab proprietor has been rested on those Acts. The decision in *Powles* v. *Hider* (4) was made to depend on the fact that, the name of the proprietor appearing on a plate affixed to the cab in conformity with the provisions of s. 20 of the London

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(1) There was an application for a new trial on the ground that there was no evidence to support that finding and that it was against the evidence. This application was refused, but that branch of the case does not call for a report.

(2) (1872) L. R. 7 C. P. 272.

(3) (1889) 23 Q. B. D. 281.

(4) (1856) 6 E. & B. 207.

(5) [1894] 1 Q. B. 292.

Hackney Carriage Act, 1831, he had held himself out to the world as the proprietor. That ground of decision is inapplicable here. In the cases of *King* v. *London Improved Cab Co.* (1) and *Keen* v. *Henry* (2) it is stated that the defendants were the registered proprietors of the cabs. There is no express provision in the Hackney Carriage Acts that the relation of master and servant shall exist between the cab proprietor and the cabdriver. The implication has been drawn in the before-mentioned cases from the statutory provisions by which a liability is imposed on the cab proprietor in certain limited respects, that by a kind of legal fiction the relation of master and servant is to be deemed to exist when it does not in fact exist; but that implication is a somewhat strained one, and it is contended that it ought not to be extended beyond the proprietor who is licensed under the Hackney Carriage Acts. The defendant was not so licensed. Sect. 28 of the London Hackney Carriages Act, 1843, provides that, where the driver of a hackney carriage by carelessness or wilful misbehaviour causes hurt or damage to any person or property in the street or highway, a justice may on complaint being made adjudge as compensation to the party aggrieved a sum not exceeding 10*l*., and may order the proprietor of the hackney carriage to pay the amount so adjudged, and the proprietor may recover the same from the driver; and by s. 35 of the same Act the proprietor may, when a complaint is made against the driver, be summoned to produce the driver. It is a somewhat forcible implication to make from such provisions that the Legislature intended to make the driver the servant of the proprietor for all purposes, when such a relation would not, apart from such provisions, have existed; and it is submitted that it sufficiently appears from the general scope of the Acts that the proprietor contemplated by those provisions is the proprietor who is the registered holder of the licence for the cab, and whom the public can find by reference to the register. By the definition of "proprietor" given by s. 2 of the London Hackney Carriages Act, 1843, that term is to include every person who alone or in partnership with any other person shall keep any hackney carriage. The object of that definition is to prevent a proprietor who is summoned under the Act from being able to set up that he has a partner, and therefore ought not to be summoned alone. It was not intended to extend the meaning of the word " proprietor " beyond the proprietor who holds the licence.

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(1) 23 Q. B. D. 281.

(2) [1894] 1 Q. B. 292.

Hammond Chambers, K.C., and *Woodfin*, for the plaintiff, were not called upon to argue.

VAUGHAN WILLIAMS L.J. I cannot say that I consider the decisions which have been given on this subject altogether satisfactory. It is to be observed with regard to the case of *Fowler* v. *Lock* (1) that the action there was by the cabdriver against the cab proprietor. The question did not arise as between a cab proprietor and a member of the general public, and therefore I do not think the case really turned on any implication arising from the terms of the legislation with regard to hackney carriages. Speaking for myself, in spite of the great authority of Willes J., the dissentient judge in that case, I agree with the reasoning of the majority of the Court, as did Cockburn C.J. in the case of *Venables* v. *Smith* (2); and I think that the relation between the cab proprietor and the cabdriver in these cases, at common law, and independently of statute, would be, not that of master and servant, or principal and agent, but that of bailor and bailee. In the case of *Powles* v. *Hider* (3) Lord Campbell C.J. in giving judgment appears to have treated the relation between the cab proprietor and the cabdriver in that case as that of master and servant, and to have supported that view by reference to the legislation as to hackney carriages in this way. He referred to the 20th section of 1 & 2 Will. 4, c. 22, by which it was provided that every hackney carriage should at all times have upon it a plate with the name of the proprietor; and he then went on to say that the proprietor, who applies for and accepts a licence to which such a condition is annexed, and employs his cab under it, must be taken to hold himself out as the ostensible proprietor of the cab, and therefore as responsible to those who use the cab in

(1) L. R. 7 C. P. 272.

(2) (1877) 2 Q. B. D. 279.

(3) 6 E. & B. 207.

Vaughan Williams L.J.

the ordinary course of dealing. That case has been followed by the comparatively recent cases of *King* v. *London Improved Cab Co.* (1) and *Keen* v. *Henry.* (2) In the former of those cases Lord Esher M.R. does not appear to have thought that the relation between the cab proprietor and the cabdriver was really that of master and servant, but to have based his decision on the provisions of the Hackney Carriage Acts. In *Keen* v. *Henry* (2) the Court of Appeal, two members of which, namely, Lord Esher M.R. and Lopes L.J., had been parties to the decision in *King* v. *London Improved Cab Co.* (1), appear to have again taken the same view. It cannot, I think, be said that the grounds of decision in the various cases have been altogether identical; and, as regards the effect of the enactments in relation to hackney carriages, I must confess that had this matter come before me as a new matter with regard to which there had been no previous decisions, I should have hesitated to draw from the provisions of the statute the inference that the Legislature meant to assume the existence of any relation between the cab proprietor and the cabdriver, or to impose any liability on the former, otherwise than in respect of the matters expressly dealt with by ss. 28 and 35. But I am not at liberty to deal with this matter as res integra. Having regard to the authorities, the only question which really seems to me to arise in this case is whether the defendant was the "proprietor" of the cab in question within the meaning of the Acts relating to hackney carriages. When it is found that she was a partner with her son, I do not think there can be any doubt that she was such a proprietor. I do not accept the view that the term "proprietor" for the purposes of the statute must be read as limited to the registered proprietor. But, assuming that it must, then, in my judgment, the registration of the son in this case must be taken to have been on behalf of the firm and to operate as the registration of the defendant as a partner in the firm.

Romer L.J. I agree. The question is whether the defendant, being a partner with her son in the business of cab proprietors, is liable in this action. It is true, in my opinion, that at common law, where a cab proprietor lets his cab to a driver on terms such as those upon which the cab in this case was let, the relation existing between them is not that of master and servant, but that of bailor and bailee; but since the London Hackney Carriages Act, 1843, there has been a series of decisions by which the law appears to me to have become perfectly well settled to the effect that the proprietor of a London cab, who employs a driver on the terms upon which the driver in this case was employed, is, so far as the general public are concerned, by virtue of the statute in the position of the master of that driver. It is true that under the statutes relating to hackney carriages the proprietor of a cab in London is bound to obtain a licence authorizing the use of the cab for the purpose of plying for hire; but I cannot see that there is anything in the Acts which makes it an essential condition of his liability to the public for the negligence of the driver that he should have discharged his duty in the matter of obtaining a licence, and have so become a licensed cab proprietor. It would be a strange thing, if a cab proprietor, whose duty it was to obtain a licence, could by disregarding that duty, and illegally carrying on his business without a licence, escape from the liability to which he would have been subject, if he had performed that duty. In the present case I would rather assume in favour of the defendant that she had not acted improperly in not obtaining a licence, and that the true view is that, when the son obtained a licence in his own name, he must be taken to have obtained it in that name as the trade name of the partnership for that purpose. But whichever way the case ought to be regarded, I think the defendant is liable in this action.

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(1) 23 Q. B. D. 281.

(2) [1894] 1 Q. B. 292.

MATHEW L.J. I am of the same opinion. The result of the authorities appears to me to be that, by virtue of the provisions of the Hackney Carriage Acts, the cabdriver must, as regards the general public, be assumed to be for all purposes the servant of the cab proprietor. That, I think, is the law intended to be laid down by the Court in *Powles* v. *Hider* (1),

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(1) 6 E. & B. 207.

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with which I respectfully agree. In *Fowler* v. *Lock* (1) Willes J. took the same view of the relation between the cab proprietor and the cabdriver; and the decisions in the recent cases of *King* v. *London Improved Cab Co.* (2) and *Keen* v. *Henry* (3) are to the same effect. Lord Esher M.R. in the first of those cases says that by virtue of the Act the relationship of master and servant must be deemed to exist; and the judgments of himself and his colleagues in that case and in *Keen* v. *Henry* (3) shew that, when a cab proprietor lets his cab upon the terms on which the cab was let in this case, the relation of a master to a servant must now be treated as imposed by law upon the cab proprietor with regard to the driver.

Application dismissed.

Solicitor for plaintiff: *S. E. Lambert.*
Solicitor for defendant: *C. T. Phillips.*

E. L.

C. A.
1902
May 12.

[IN THE COURT OF APPEAL.]

CARIDAD COPPER MINING COMPANY *v.* SWALLOW.

Company—Directors' Remuneration—Fixing Time of Payment—Condition Precedent—Power to postpone Payment.

Where the articles of association of a company provided that there should be allowed to each of the directors out of the funds of the company as a remuneration for his services a certain sum per annum to be paid at such times as the directors might determine:—

Held, that it was a condition precedent to the right of a director to sue for remuneration in respect of a year's service that the directors should have determined a time for payment thereof.

APPEAL by the personal representative of the defendant, who had died since the commencement of the action, from the judgment of Wright J. in an action tried before him without a jury.

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(1) L. R. 7 C. P. 272.
(2) 23 Q. B. D. 281.
(3) [1894] 1 Q. B. 292.

The action was against a shareholder in the plaintiff company for calls upon shares in the company.

The defendant, who was a director of the company, counter-claimed 400*l.* in respect of remuneration which he alleged to be due to him for two years' services by him as a director under the articles of association.

No question arose on the appeal with regard to the claim of the plaintiff company, the only question being as to the validity of the defendant's counter-claim, with regard to which the facts were as follows. The company was incorporated on February 15, 1899. By the articles of association of the company it was provided that "the directors shall be allowed to receive as a remuneration for their services, and there shall be allowed to them out of the funds of the company from the date of the incorporation of the company, the sum of 200*l.* per annum each, with 50*l.* per annum extra for the chairman, to be exclusive of the remuneration of any managing director, and to be paid at such times as they may determine, and they shall also be entitled to receive and be paid in like manner 5*l.* per cent. of the net profits available for dividend in each year divisible equally amongst them." The defendant had been a director from the incorporation of the company down to the date of the action, a period exceeding two years. On December 28, 1899, at a meeting of the board a resolution was passed of which the minute was to the following effect: "With reference to the question of unpaid directors' fees, it was agreed in view of the fact of the company being without funds that the payment of the same should remain in abeyance for the time being."

The learned judge held that under these circumstances the counter-claim could not be sustained, and gave judgment for the plaintiffs upon it accordingly.

Younger, K.C., and *Lowenthal*, for the appellant. It is submitted that upon the true construction of the articles of association the defendant was entitled to the remuneration therein provided for in respect of the two years for which he had served as director; and it was not a condition precedent to the accrual of that right that the directors should have passed

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Caridad Copper Mining Company v. Swallow.

a resolution determining a time for payment: *Nell* v. *Atalanta Gold and Silver Consolidated Mines.* (1) The provision in the articles with regard to the directors determining the time for payment has not the effect of allowing a majority of the directors to suspend indefinitely the payment of the remuneration which by the articles is due to a director who has served for the year: it is merely meant to enable them to provide for payment of portions of the remuneration for the year by way of anticipation before the end of year, as for instance by quarterly or half-yearly payments, which without some clause of that kind could not have been done. See the cases of *Salton* v. *New Beeston Cycle Co.* (2) and *In re Central de Kaap Gold Mines* (3), in which it was held that the director's remuneration for the year was not apportionable.

Witt, K.C., and *Montague Shearman*, for the respondent company, were not called upon.

Vaughan Williams L.J. In my opinion the judgment of the learned judge was correct and ought to be affirmed. The whole question turns on the construction of the articles of association. It is said that the words "and to be paid at such times as they may determine" do not import a condition precedent to the right of the director to be paid the remuneration mentioned in the articles. I see no reason why we should limit the meaning of those words, or give them any other than their natural construction; and I think that according to that construction they do import such a condition as I have mentioned. According to their natural meaning the words appear to give the directors power either to anticipate or postpone the time for payment of the yearly remuneration. In my judgment they were inserted for the purpose of enabling the directors to arrange the time of payment in the manner which they deemed most consistent with the interests of the company. They may, I think, under those words provide, if they think fit, for payments by anticipation before the end of the year, or postpone payment indefinitely; because, if the company is in a bad financial position, it is impossible to say beforehand when it will be proper to make the payment. As I have said, in my judgment the natural construction of the words is that they import as a condition precedent to the right of a director to sue for remuneration that the directors should have determined the time for payment. With regard to the case of *Nell* v. *Atalanta Gold and Silver Consolidated Mines* (1), all I can say is that it obviously turned on the very special terms of the articles of association there in question, which differ from those which we have to construe. It does not appear clearly from the report in *The Times* Law Reports whether in fact there were or were not in that case funds in the hands of the company for the payment of the directors' fees. I see nothing in the decision in that case to prevent us from giving the words in the present case their natural construction.

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(1) (1895) 11 Times L. R. 407.

(2) [1899] 1 Ch. 775.

(3) (1899) 69 L. J. (Ch.) 18.

ROMER L.J. concurred.

MATHEW L.J. In this case the directors passed a resolution postponing the payment of the directors' remuneration for the excellent reason that the company had no funds out of which to pay it. It appears to me that, upon the plain meaning of the language contained in the articles of association, they had power to postpone the period for payment, and that they most properly exercised that power. I agree therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *G. Castle.*

Solicitors for defendant: *Rowcliffes, Rawle & Co., for R. W. H. Thomas, St. Helen's.*

E. L.

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(1) 11 Times L. R. 407.

1902
May 14.

[IN THE COURT OF APPEAL.]

COUNTY COUNCIL OF HERTFORDSHIRE *v.* RURAL DISTRICT COUNCIL OF BARNET.

Highway—Bridge, Construction of—Agreement between County Council and Surveyor of Highways for a Parish—Contract by Surveyor of Highways for Payment of Money by his Successors—Highways and Bridges Act, 1891 (54 & 55 *Vict. c.* 63), *s.* 3.

A surveyor of highways for a parish, acting under the Highways and Bridges Act, 1891, s. 3, entered into an agreement with a county council by which he contracted, for himself and his successors, as highway authority for the parish, to contribute towards the building of a bridge a certain sum by two instalments, the second of which was to be payable after the expiration of his year of office:—

Held, that he had power to make such a contract under the before-mentioned enactment.

APPEAL from the judgment of Lawrance J. in an action tried before him without a jury.

The action was for a sum of 100*l.* alleged by the plaintiffs to be payable to them by the defendants under the after-mentioned agreement. One Henry Lovejoy was the surveyor of highways for the parish of Totteridge, in the county of Hertford, for the year ending April 19, 1899. By deed dated September 24, 1898, and made between the plaintiffs of the one part, and the said Henry Lovejoy, as the surveyor of highways for the said parish of Totteridge, on behalf of himself and his successors as highway authority in and for the said parish (thereinafter called " the highway authority "), of the other part, after reciting that the parties thereto were desirous of constructing a bridge for the purpose of carrying the highway leading from the town of Barnet to the Totteridge main road near the Totteridge church over the stream or ford known as Totteridge Ford, at the point situate within the said parish of Totteridge where the said stream or ford crossed the said highway, and that it had been arranged that the parties thereto

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should enter into the agreement thereinafter contained for or in relation to the construction of such bridge, and for determining the proportions in which the expenses to be incurred for the purpose aforesaid should be defrayed by the said parties respectively, and that it was estimated that the said expenses would amount to the sum of 600*l.*, or thereabouts, in exercise of the powers conferred on them respectively by s. 3 of the Highways and Bridges Act, 1891, and of all other powers (if any) enabling them on that behalf, the parties to the said deed mutually agreed and declared—(1.) that a bridge should be constructed for the purpose of carrying the said highway over the said stream or ford at the point aforesaid, and that all such works as the county surveyor for the time being of the said county of Hertford should deem necessary or proper for the purpose aforesaid should be executed by the plaintiffs as soon as might be under the directions of the said county surveyor; (2.) that the expenses to be incurred in the execution of the said works should be borne as to the sum of 200*l.* part thereof by the highway authority, and as to the residue thereof (not exceeding 400*l.*) by the plaintiffs; (3.) that the said sum of 200*l.* should be paid to the plaintiffs by the said highway authority out of such moneys as such authority should from time to time be authorized to apply to the purpose aforesaid, and that such authority should take all proper steps for raising the said sum, and should pay the same to the plaintiffs by two equal instalments of 100*l.* each, of which the first should be so paid on December 31, 1898, and the second should be so paid on December 31, 1899; (4.) that all disbursements required to be made for the purposes of the said works should be made by the plaintiffs as occasion should require out of the moneys so received by the plaintiffs from the said highway authority or payable by the plaintiffs under the said agreement, and that the said works and the superintendence thereof, and the making of all contracts, and the doing of all things in connection therewith, should be under the sole control of the plaintiffs and the said county surveyor; (5.) that as soon as the said bridge should have been erected and completed to the satisfaction of the county surveyor, and all moneys payable to

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the plaintiffs by the said highway authority under the said agreement should have been paid, the said bridge should be taken over by the county council as a county bridge, and should thereafter be maintained and repaired by the county council; (6.) and that nothing in the said agreement should be construed as imposing any liability on the said Henry Lovejoy to pay any sum out of any moneys other than moneys coming to his hands as highway authority for the said parish of Totteridge, and that his liability under the said agreement should be deemed to be and should enure as a liability of the highway authority for the time being having jurisdiction in and for the said parish.

On or about October 31, 1898, the works in connection with the erection of the said bridge were commenced, and were continued down to and on March 31, 1899, by the plaintiffs and under the direction of the said county surveyor, and all disbursements required to be made for the purpose of the said works were made by the plaintiffs as occasion required out of moneys received by the plaintiffs from the said highway authority or payable by the plaintiffs under the terms of the said deed. On or about January 2, 1899, the first instalment of 100*l.* mentioned in the said deed was paid to the plaintiffs by Henry Lovejoy as such surveyor of highways as aforesaid. On April 1, 1899, the defendants, pursuant to s. 25 of the Local Government Act, 1894, became the successors of Henry Lovejoy as highway authority in and for the parish of Totteridge, and became subject to all the duties and liabilities of Henry Lovejoy as such surveyor of highways and highway authority as aforesaid. After April 1, 1899, the works in connection with the erection of the said bridge were continued by the plaintiffs down to about October 25, 1899, when the said bridge had been erected and completed to the satisfaction of the said county surveyor, and all disbursements required to be made for the purposes of the work so done were made by the plaintiffs out of moneys payable by them under the terms of the said deed except as to 100*l.*, part of the said disbursements, which sum was paid out of their own moneys.

The defendants refused to pay the second instalment of 100*l.*, which was to be paid by the highway authority under the deed of September 24, 1898.

The learned judge gave judgment for the plaintiffs for the amount claimed.

Macmorran, K.C., and *Alexander Glen*, for the defendants. It is submitted that the surveyor of highways had no power to bind his successors by making an agreement for payment of a sum of money after his year of office had expired. It will not be disputed that, as a general rule, the power of the surveyor of highways to contract liabilities and defray them out of the rates is limited to his year of office. He can only make an agreement to pay money on behalf of the parish at a time when he can raise the money by making a rate: *Frodingham Iron and Steel Co.* v. *Bowser.* (1) The plaintiffs will rely on the provisions of s. 3 of the Highways and Bridges Act, 1891, as authorizing the surveyor to make this contract. But it is submitted that that section cannot be construed as enlarging the capacity of a surveyor of highways, so as to enable him to make contracts binding his successors after his year of office has expired; it only enlarges the subject-matter with regard to which the authorities mentioned in the section may contract by enabling them to contract with another with regard to matters outside their respective districts. The surveyor of highways has no power to borrow money on behalf of the parish. Superior highway authorities, such as county councils, highway boards, and sanitary authorities, have only been given power to borrow money and so charge the rates prospectively with the sanction of the Local Government Board or the county council as the case may be, and it would be most anomalous if a surveyor of highways, an annually appointed officer, who is not a corporation and has no power to borrow, could impose upon his successors a liability for a number of years without any sanction.

[ROMER L.J. According to the defendants' construction of s. 3, practically a highway authority, if a surveyor of highways, could not make an agreement under the section in relation to

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(1) [1894] 2 Q. B. 791.

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the construction of a bridge, if the work would last for more than one year.]

He might do so by arranging for the payment of a lump sum during his year of office.

[They cited the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 49, and the Highway Rate Assessment and Expenditure Act, 1882 (45 & 46 Vict. c. 27), s. 5.]

Danckwerts, K.C., and *R. D. Muir* (*Colquhoun Dill* with them), for the plaintiffs, were not called on to argue.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must fail. The argument urged before us is as follows. It is not denied that the words of s. 3 of the Highways and Bridges Act, 1891, are such that, if they are construed in their natural sense, the section must be read as giving to the surveyor of highways the power to make the contract which was made in this case. But it is said that, by so construing them, we should be imputing to the Legislature that in this section they had made an enactment which was not entirely consistent with previous legislation as to the surveyor of highways and the previous history of that office. I do not think that this would be a sufficient reason for not giving to the section the meaning which is plainly conveyed by the words of it. The considerations urged by the counsel for the defendants do not appear to me sufficient to justify us in refusing to construe the section according to what seems to be the manifest intention of the Legislature as expressed by the language which they have used. I am sure I cannot say whether the Legislature, when they passed the section, did or did not overlook these matters, or whether they did or did not contemplate giving to the surveyor of highways a larger authority than that given to what have been called superior highway authorities. In any case I do not see how we should be justified in not giving to the words of the section their plain meaning. It is not disputed that, if it was competent for the surveyor to make this contract under s. 3 of the Act of 1891, the liability to pay the second instalment under it has been transferred to the defendants under s. 25 of the Local Government Act, 1894.

ROMER L.J. I am of the same opinion. I do not think that we ought to narrow the provisions of s. 3 of the Highways and Bridges Act, 1891, in the manner contended for by the defendants. That section in terms gives power to the council of any administrative county and any highway authority or authorities to make and carry into effect agreements with each other for or in relation to (among other things) the construction of any bridge. That provision is clearly not limited to cases in which the construction of the bridge will not take longer than the current year of office of a highway authority. I see nothing in the section which involves in such a case that payment for the work must be made in advance. I do not see why, if the work takes longer than the year, the payment should not be made in the ordinary way when the work is completed, or by instalments as the work proceeds. The construction contended for would practically make it impossible for the surveyor of highways to make an agreement such as is provided for by the section, if the occasion for making it occurred towards the close of his year of office; but the section appears to contemplate that a highway authority should have power at any time to make such an agreement. I agree that a reasonable exercise of the power given is contemplated, and there might possibly be an agreement which purported to be made under the section, but which might be invalid as an abuse of the power given. But in the present case, when I look at the agreement, I find that it relates to a bridge, the construction of which was commenced in October, 1898, and completed in October, 1899, and that it provides for payment for the work by two instalments—one payable in December, 1898, and the other in December, 1899. That seems to me a very reasonable and proper arrangement to make as to the payment for the work, and in my opinion it is clearly within the power given to highway authorities by s. 3 of the Act of 1891.

MATHEW L.J. I am of the same opinion. With reference to ordinary parochial charges and expenses in respect of highways, it has no doubt been laid down that the surveyor of highways cannot contract for payments so as to bind his

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Mathew L.J.

successor after his year of office has expired. It is argued that we ought to construe the provisions of s. 3 of the Highways and Bridges Act, 1891, by reference to that limitation of the powers of the surveyor. But we find on looking at the section that it contemplates an exceptional description of contract, namely, one with regard to the construction of a bridge, a matter which in the ordinary course of things would be likely to extend beyond the year of office of the surveyor of highways. Why should we in respect of such a matter restrict the natural meaning of the terms of the section by reference to limitations of the power of the surveyor applicable to a different subject-matter? We ought, as it appears to me, to construe the section according to its terms. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *J. H. Mason & Co., for C. E. Longmore, Hertford.*

Solicitors for defendants: *Byfield & Son.*

E. L.

In re DRUCKER (No. 1).
Ex parte BASDEN.

1902
May 5.

Bankruptcy—Property of Bankrupt—Money advanced for special Purpose—Payment to Creditor by Bankrupt's Solicitors—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44.

After the presentation of a bankruptcy petition against a debtor, the solicitors of the debtor offered the solicitor of the petitioning creditor 300*l.* for the dismissal of the petition, stating that the debtor had no means, and that the money would have to be found. The solicitor of the creditor accepted this offer in the honest belief that the 300*l.* was not the debtor's money, and the petition was dismissed. The money was, in fact, borrowed by the debtor from his solicitors for the purpose. Shortly afterwards the debtor was adjudicated bankrupt:—

Held, that the 300*l.* never formed part of the general assets of the debtor, and could not be recovered by the trustee in bankruptcy from the creditor as the property of the bankrupt.

Re Snyder, (1891) 8 Morr. 127, not followed.

THIS was an application by the trustee in bankruptcy claiming the repayment of a sum of money paid to a creditor of the debtor under these circumstances.

On January 24, 1901, the Birmingham District and Counties Banking Company, Limited, who were creditors of the debtor for 1000*l.*, presented a bankruptcy petition against him based on an act of bankruptcy committed by him on the previous December 12. The petition was ordered to be heard on February 15. The debtor was very anxious about the petition, and early in February interviews took place between Mr. Beyfus, a member of the firm of Beyfus & Beyfus, the solicitor of the debtor, and Mr. Salaman, the solicitor of the bank, with a view to obtain a compromise and the dismissal of the petition. Mr. Beyfus informed Mr. Salaman that the debtor had no money, but that his relatives were very wealthy; and eventually Mr. Beyfus offered to pay 300*l.*, namely, 250*l.* on account of the debt and 50*l.* for costs, on condition that the petition was dismissed, and added, "We shall have to find the money." Mr. Salaman accepted the offer in the belief that the 300*l.* so to be provided was not the debtor's money; and accordingly, on February 15, Mr. Beyfus handed his firm's cheque of 300*l.* to Mr. Salaman, and the petition was dismissed.

On July 9, 1901, a receiving order was made against the debtor on a petition presented on the previous March 6, and adjudication followed. It then transpired that on the previous February 14 the debtor had executed a charge on certain of his property in favour of Messrs. Beyfus & Beyfus to secure 328*l.* then due to them for costs, and 300*l.* stated to be then advanced by them to him; and that it was this sum of 300*l.* which Messrs. Beyfus & Beyfus had, on February 15, paid direct by their own cheque to Mr. Salaman for the bank; and that they had repaid themselves out of moneys of the bankrupt that shortly afterwards came into their hands.

Under these circumstances the trustee in bankruptcy claimed that the bank should refund to him the 300*l.* as part of the property of the bankrupt received by them with notice of an available act of bankruptcy.

Reed, K.C., and *Carrington*, for the trustee. This loan really became part of the general assets of the debtor which he could deal with as he liked, and Messrs. Beyfus, his solicitors, paid it on his behalf to the bank. He had a general cash account with his solicitors, and they made disbursements as he directed. The case of *Re Snyder* (1) is directly in point.

Muir Mackenzie, and *J. G. Joseph*, for the bank. This money never became part of the general assets of the debtor. Messrs. Beyfus were also creditors, and this money was really lent by them for the express purpose of stopping the petition by the bank. They paid it direct by their own cheque to Mr. Salaman, who received it in good faith and without notice that it was the debtor's money. The principle of *Re Rogers* (2) applies. In that case the Court of Appeal questioned the soundness of *Re Snyder*. (1)

Reed, K.C., in reply.

WRIGHT J. I have not to consider to-day whether the charge which the debtor gave to Messrs. Beyfus & Beyfus can be sustained, or whether it may not be open to attack by the trustee. All that I have to consider is, whether this money, which was paid to the bank, was the money of the debtor or not. Now it is not a very easy matter, either in point of law or in point of fact, to decide; but if the 300*l.* ever became the debtor's money, it is plain that he had the right to spend it, or to speculate with it, or do whatever he pleased with it. But what I find is, that it never came into the debtor's hands at all; and I am of opinion that it never was intended to come into his hands. It is quite clear that Messrs. Beyfus & Beyfus would never have consented to that money going out of their hands into the debtor's hands, or being applied for any purpose whatever other than the dismissal of the petition by the bank. Beyfus & Beyfus themselves could not have applied it to any other purpose after the arrangement which they had made with Mr. Salaman on the one hand and the debtor on the other: nor, as I have said, could the debtor have applied it to any other purpose. The charge is contemporaneous with the arrangement that is made with Mr. Salaman, and, although the charge on the face of it treats this as a loan by Messrs. Beyfus to the debtor, that cannot alter the real character of the transaction if the real character was inconsistent with the way in which it is described in the charge. I cannot help thinking that this money was never free, and never became part of the general assets of the debtor at all. He never had any right to receive it, or use it, or apply it to any purpose except this one particular purpose. Under these circumstances it seems to me it was impressed with a trust—not in the strict sense of the word—but in substance with a quasi-trust that it should be applied by Beyfus & Beyfus out of their own money for the discharge pro tanto of the claim of the bank. That being so, the trustee's present application fails. I say nothing about any possible application to get rid of the charge. I do not know whether it would succeed or not.

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(1) 8 Morr. 127.

(2) (1891) 8 Morr. 243, 248.

Solicitors: *King, Wigg & Co.; Salaman, Fort & Co.*

H. L. F.

1902
April 21.

In re JUKES.
Ex parte OFFICIAL RECEIVER.

Bankruptcy—Transfer of Property for Past Debt—Act of Bankruptcy—Fraudulent Preference—Protected Transaction—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 4, 49.

A creditor who takes a transfer of substantially the whole of the property of his debtor in payment of a past debt, with notice that there are other creditors, cannot be said to be acting in good faith, and is therefore not entitled to the protection of s. 49 of the Bankruptcy Act, 1883; and such a transaction is an act of bankruptcy and primâ facie a fraudulent preference on the part of the debtor.

Shears v. *Goddard*, [1896] 1 Q. B. 406, distinguished.

This was an application which raised the question whether a transaction between the debtor and one of his creditors was protected by s. 49 of the Bankruptcy Act, 1883, under these circumstances.

The debtor was a cab proprietor and, prior to July, 1901, had considerable transactions with one Whitfield, who was a dealer in cabs, horses, and harness, and who also lent the debtor money from time to time for the purposes of his business.

In July, 1901, the debtor owed Whitfield some 150*l.* for horses, cabs, and harness that he had purchased of Whitfield and for money lent him by Whitfield. On August 5 Whitfield pressed the debtor for payment, and it was then verbally agreed between them that Whitfield should remove to his own premises all the stock-in-trade of the debtor, and should sell it by public auction at a repository, and should out of the proceeds pay all the expenses of and incident to the sale and his debt of 150*l.*, and hand over the balance, if any, to the debtor. At this time Whitfield knew that there were other creditors, and that one of them, Jennings, was threatening to issue a writ. On August 9 Whitfield, in pursuance of the above agreement, removed all the debtor's stock-in-trade, consisting of horses, cabs, and harness, and sold it by public auction on September 14 for 170*l.* The expenses of the sale and the keep of the horses for a month amounted to 46*l.*, which left only 124*l.* for Whitfield, so that nothing remained for the debtor. After the sale Whitfield set up the debtor again with three horses and cabs on the hire system at a weekly rent.

On October 10 a receiving order was made against the debtor on a bankruptcy petition presented by Jennings, and adjudication followed on October 21. It appeared that the debtor's liabilities, exclusive of his debt to Whitfield, amounted to about 300*l.*, and he had no assets. The official receiver, who was the trustee in the bankruptcy, now claimed that the above transaction was an act of bankruptcy and a fraudulent preference. There was no previous act of bankruptcy.

Carrington, for the trustee. This was an assignment of substantially the whole of the debtor's property for a past debt within three months of the date of the receiving order. It was therefore an act of bankruptcy within s. 4, sub-s. 1 (*b*), of the Bankruptcy Act to which the title of the trustee relates back: *Re Rayment.* (1)

[WRIGHT J. How do you get over *Shears* v. *Goddard*? (2)]

That was an out and out purchase and sale for cash in the ordinary course of business. Here Whitfield knew other creditors were pressing, and the consideration was a past debt.

[WRIGHT J. Do you say that the past debt was not a valuable consideration within the meaning of s. 49 of the Act?]

No. But it is an element in the case. The trustee submits that this is not a protected transaction, and also that on the evidence it was a fraudulent preference.

Scott, for Whitfield. This was not a fraudulent preference. The onus is on the trustee to prove fraud, and there is no evidence of it. The fact that Whitfield, as an act of kindness to the debtor and to keep him from the workhouse, lent him afterwards three horses and cabs on the hire system is not evidence of fraud. On the first point, the case is covered by *Shears* v. *Goddard*. (2) Whitfield was pressing for his debt. He acted in good faith and for valuable consideration, and

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(1) (1899) 6 Man. 288.

(2) [1896] 1 Q. B. 406.

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JUKES, *In re.* OFFICIAL RECEIVER, *Ex parte.*

without notice of an act of bankruptcy. The fact that he knew there were other creditors is not enough to invalidate the transaction, which falls within the protection of s. 49.

Carrington, in reply.

WRIGHT J. I think it is quite clear that the debtor committed an act of bankruptcy in parting with the whole of his property to one of his creditors to satisfy a past debt. But the question is whether the decision in *Shears* v. *Goddard* (1) applies and helps the creditor. I think I shall not be deciding anything contrary to the decision in *Shears* v. *Goddard* (1) if I hold that s. 49 of the Act does not protect a creditor who takes over substantially the whole of a debtor's property in satisfaction of a past debt, knowing that there are other creditors. In *Shears* v. *Goddard* (1) it did not appear that the purchasers were creditors of the debtor, nor that they knew that they were taking all the property of the debtor, or were aware of anything that rendered the transaction fraudulent. They were purchasers in good faith and for valuable consideration. But I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith. On the whole, therefore, I hold that the transaction in this case is not protected by s. 49 of the Act. Then, as to fraudulent preference. There is no direct evidence, but looking at the evidence as a whole I think the right inference is that the debtor intended to prefer Whitfield. He was acting from motives of gratitude, and he must have known that he was benefiting Whitfield to the detriment of all his other creditors. The trustee, therefore, is entitled to judgment.

Solicitors: *Howard & Son; Alfred White & Co.*

H. L. F.

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(1) [1896] 1 Q. B. 406.

[IN THE COURT OF APPEAL.]

C. A.
1902
March 22.

PROPERTY EXCHANGE, LIMITED *v.* WANDSWORTH BOARD OF WORKS.

Metropolis—Management Acts—"New Street"—Widening of Old Street—Paving Expenses—Liability of Frontagers—Metropolis Management Acts, 1855 (18 & 19 *Vict. c.* 120), *s.* 105; 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112 —*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 9, 215.

Where an old street repairable by the inhabitants at large, and having houses upon one side of it, is widened by the addition of a longitudinal strip of land of a substantial width upon the opposite side, the strip so added becomes itself a new street, and the expenses of paving the added strip, whether under the Metropolis Management Acts, 1855 and 1862, or the Public Health Act, 1875, must be apportioned solely among the owners of property abutting upon that strip, and not upon the owners of property abutting upon the old street.

Richards v. *Kessick*, (1888) 57 L. J. (M.C.) 48, and *White* v. *Fulham Vestry*, (1896) 74 L. T. 425, approved.

APPEAL from a decision of the King's Bench Division (Lord Alverstone C.J. and Lawrance J.) upon a case stated by a metropolitan police magistrate. The facts were in substance as follows:—

A summons had been issued at the instance of the Wandsworth Board of Works, the respondents, against the company, the appellants, to answer a claim by the board for 69*l.* 11*s.* 3*d.*, being the sum apportioned by them on January 31, 1900, in respect of certain premises of which the company were the owners or occupiers, and being the proportion payable in respect of such premises towards the expense of paving a new street called Totterdown, on the north side thereof.

The street or roadway known as Totterdown had at the time of the hearing buildings erected on both sides. The row of houses on the south side, belonging to a Mr. Melhuish, were erected before 1855, and probably as far back as 1825. The houses or walls on the north side included, among other buildings, the flank and flanking fence of the appellants' premises, known as 29, St. Cyprian Street. The appellants' house and premises were purchased by them in 1899, having been erected in or about 1898. There were no windows or apertures on the Totterdown side of the main building of the house but three windows and a fanlight, and all ingress and egress was from St. Cyprian Street, the premises being continuous with other houses in that street.

In and for many years prior to 1855 Totterdown Road was a formed road used for wheeled and foot traffic, opening at High Street at one end, and used for every description of traffic, and at the other end leading into meadows open only for foot-passengers. It was a public thoroughfare known only by the name of Totterdown, and had been repaired when required by the board since 1855.

In or about 1898 Totterdown Road was widened from the width of sixteen feet to forty feet, and a new street, known as St. Cyprian Street, was at the same time made running into Totterdown; but, except the widening and the building of certain houses and flanking fences on the north side, Totterdown had not altered in character or position or in any other way since the houses on the south side were erected; the neighbourhood had, however, become more thickly populated. In or about 1898 the lands on the north side of Totterdown were laid out for building purposes, and the new street, known as St. Cyprian Street, running nearly at right angles into Totterdown, was made. The appellants had paid their due proportion of the expenses of paving St. Cyprian Street. That portion of Totterdown proposed to be adopted by the board, being of the width of twenty-four feet or thereabouts, was bounded on the north by land and messuages, including the premises of the appellants, and on the south by a space of sixteen feet, being the old highway known as Totterdown.

The amount of 36*l*. 5*s*. 6*d*. was claimed by the respondents from the appellants in accordance with their notice of October 7, 1899, as being the proper proportion of the rate payable by them, and in calculating that amount the respondents took into consideration that a due proportion would be paid by the owners of the houses on the south side of Totterdown.

On December 28, 1899, a summons was taken out by the board against a Mr. Melhuish, an owner of one of the houses on the south side of Totterdown, to recover the sum of 19*l*. 1*s*. payable by him under the above-mentioned apportionment, which summons was dismissed on the ground that Totterdown, as to so much thereof as formed the site of the old street before the widening took place, was not a new street within the meaning of the Metropolis Management Acts.

On February 14, 1900, the appellants received notice from the clerk of the respondents demanding the sum of 69*l*. 11*s*. 3*d*., that sum being in respect of a new apportionment made in consequence of the decision above mentioned, which in effect exempted the owners of the houses on the south side of Totterdown from the expenses of paving the space on the north side of the old site. The works referred to in the notice had not been commenced.

It was contended on behalf of the appellants, first, that upon the true construction of s. 105 of the Metropolis Management Act, 1855, and ss. 77 and 112 of the Metropolis Management Act, 1862, the portion of Totterdown proposed to be adopted by the respondents—that is, the northern portion of twenty-four feet or thereabouts—was not a new street within the meaning of those Acts or either of them; that the resolution of the respondents of January 31, 1900, apportioning the estimated expenses of paving the alleged new street, was invalid and not binding on the appellants, so as to fix the liability for contributing for the same at the sum of 69*l*. 11*s*. 3*d*., or any part thereof, on the ground that the road or street known as Totterdown, or any part thereof, was not a new street within the meaning of the above-mentioned Acts, and having regard to the magistrate's decision respecting the southern portion of Totterdown. Secondly, that the resolution of the respondents fixing a new apportionment after the magistrate's previous decision was invalid, on the ground that the appellants had paid or offered to pay the sum demanded under the first apportionment, and that the respondents were not enabled under their powers to make a fresh apportionment annulling the first apportionment and in substitution therefor. Thirdly, that the apportionment was invalid, inasmuch as it was not within the power of the respondents whilst treating Totterdown in its entirety to make an apportionment for the pavement of it longitudinally; that if Totterdown was to be regarded in its entirety for the purpose of judging whether it was or was not a new street, the owners of the houses on both sides, which would include the owners of houses on the south side, ought to bear their due proportion of the expense. Fourthly, that the decisions in *Richards* v. *Kessick* (1) and *White* v. *Fulham Vestry* (2) did not apply, and, in so far as any principle or doctrine covering the present case might appear therein, that such principle or doctrine ought not to be applied under the circumstances. [The following cases were cited: *Robinson* v. *Barton Local Board* (3); *Whitchurch* v. *Fulham Board of Works* (4); *Mile End Vestry* v. *Whitechapel Union* (5); *Clacton Local Board* v. *Young* (6); *Paddington Vestry* v. *North Metropolitan Ry. Co.* (7); *St. Giles' Vestry* v. *Crystal Palace Co.* (8); *St. George's Local Board* v. *Ballard.* (9)]

The learned magistrate held that the appellants were liable, and made an order directing them to pay the amount claimed, but stated this case for the opinion of the Court. The Divisional Court (Lord Alverstone C.J. and Lawrance J.) affirmed the magistrate's decision, and the company brought the present appeal.

Whitmore L. Richards, for the appellants. The Divisional Court was wrong in holding that the added strip of land could be looked at separately from the street to which it was added, and could by itself be a new street; the old and the new part must be looked at as a whole to see whether they together form a new street within the meaning of s. 105 of the Metropolis Local Management Act, 1855. First, the added strip became merged in the old street when it was widened, and the whole became an old street; in this view the expenses of paving are

(1) 57 L. J. (M.C.) 48.
(2) 74 L. T. 425.
(3) (1882) 21 Ch. D. 621.
(4) (1866) L. R. 1 Q. B. 233.
(5) (1876) 1 Q. B. D. 680.
(6) [1895] 1 Q. B. 395.
(7) [1894] 1 Q. B. 633.
(8) [1892] 2 Q. B. 33.
(9) [1895] 1 Q. B. 702.

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payable out of the rates. Alternatively—and this is the view which seems to be supported by the authorities—the whole became a new street, and the apportionment should have been made on the owners on both sides, and not on those on the north side only. A street cannot be divided longitudinally. Where a new street is paved over only half of its breadth, the apportionment should be on the frontagers on both sides: *Mile End Vestry* v. *Whitechapel Union.* (1)

[COLLINS M.R. There the whole was a new street in fact; here part is old and part new.]

Even where a footway on one side only is paved, the owners on both sides are liable: *Paddington Vestry* v. *North Metropolitan Railway and Canal Co.* (2) The cases of *Richards* v. *Kessick* (3) and *White* v. *Fulham Vestry* (4), upon the authority of which the magistrate and the Divisional Court relied, are distinguishable. *Richards* v. *Kessick* (3) was a decision under s. 150 of the Public Health Act, 1875, which does not deal simply with new streets but with private streets, and "the carriageway, footway, or any other part of such street," and gives the local authority power to compel paving, &c., by notice addressed to the owners or occupiers of the premises fronting, adjoining, or abutting "on such parts thereof as may require" paving. That is very different from s. 105 of the Metropolis Local Management Act, 1855, which imposes the liability on the owners of the houses "forming such street," and from s. 77 of the Act of 1862, which places it also on the owners of the land "abutting on such street." The case of *White* v. *Fulham Vestry* (4) is distinguishable on the ground that the owners on one side had previously paid the whole expenses of paving the street under s. 105 of the Act of 1855, and, therefore, could not be called on to contribute to the expense of widening the street by an addition on the other side. Further, s. 98 of the Metropolis Local Management Act, 1862, prohibited the laying out of any road, whether an existing road or not, for carriage traffic, unless it was of the minimum width of forty feet, and further provided that any road to be so laid

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(1) 1 Q. B. D. 680.
(2) [1894] 1 Q. B. 633.
(3) 57 L. J. (M.C.) 48.
(4) 74 L. T. 425.

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out should be deemed to be a new street. It is true that that section was repealed by s. 215 of the London Building Act, 1894, s. 9 of which Act gave the local authority a discretion as to sanctioning or refusing to sanction a road for carriage traffic of less than that width; but the effect of giving this discretion to the local authority cannot be that whereas, prior to 1894, both the old street and the added portion would have been treated as one new street, they can now be treated separately. [He also cited *Dryden* v. *Putney Overseers* (1); *Wright* v. *Ingle* (2); *Wilson* v. *St. Giles Camberwell Vestry*. (3)]

Mattinson, K.C. (*J. C. Earle* with him), was directed to confine his argument to the point upon s. 98 of the Act of 1862. It is true that if that section had been unrepealed it would have been in the appellants' favour. But there is now an absolute discretion in the local authority under s. 9 of the London Building Act, 1894, as to the width of a street for carriage traffic. And the provision in s. 98 that any road, &c., to be thereafter laid out for such purpose should be deemed to be a new street is wholly omitted from s. 9 of the later Act.

[He was stopped by the Court.]

COLLINS M.R. This appeal raises the question whether a new strip of land, which had been dedicated as a highway and constituted a street, can be itself a new street apart from the adjoining part of the street which had previously become an old street. The chief contention has been that in such a case the added strip receives the old street into itself, so that the two become one entity, and, therefore, one new street, with the result that in apportioning the expenses of paving the new part the apportionment would extend over the owners of the frontages on both sides. In the present case there was a street which had been a highway from the year 1825, and had become an old street. On the south side were a number of cottages, which were an important factor in constituting the highway a street; the street was paved on that side, and from time to time substantial repairs were done to it; the frontagers on the

(1) (1876) 1 Ex. D. 223.

(2) (1885) 16 Q. B. D. 379.

(3) [1892] 1 Q. B. 1.

north side took no part in the acts of repair. Then a new strip of land was dedicated on the north side, houses were built on that side, and the local authority paved the new part of the street. When it came to paying for the paving expenses, the local authority at first apportioned them so as to include the frontagers on the south side, who had already paid their share when the old street was paved: this apportionment the learned magistrate held to be bad. The local authority then made a fresh apportionment upon the frontagers on the north side only, which the Divisional Court has held to be good. They have held that the frontagers on the north side in fact abutted on a new street, that the added strip was by itself a new street, and that the decision of the local authority was right; in other words, that the apportionment ought not to extend to the frontagers on the south side of the old street, but should be confined to the frontagers on the north side only. The principal contention of the appellants is that the whole area of the old street and of the new strip is to be taken as one new street; this, if correct, would let in the apportionment upon the south side as well as upon the north, although the cottages on the south side had presumably borne their share of the expenses of the old work. There was a second contention—that the added strip had become merged in the old street, that the two only formed one street in fact, that the old street was not, and could not be, a new street, and that therefore the paving expenses were payable out of the general rate and not by the frontagers. Now s. 105 of the Metropolis Management Act, 1855, which deals with the paving of new streets, provided that the expense was to be borne by the owners of the houses forming the street, and s. 77 of the Metropolis Management Act, 1862, amended this by making the owners of the land bounding or abutting on the street liable to contribute to the expenses as well as the owners of houses; these two sections define the parties liable to contribute. The appellants contend that under these sections the owners of the cottages on the south side of the old street are liable; and if it were true that the old street and the added strip had all become merged in one entity and had become one new street, no doubt the liability of the owners of the cottages would follow as a necessary consequence. The magistrate has found, and the Divisional Court has upheld his view, that the added strip on the north side is itself a separate new street, with the result that the paving expenses are thrown upon the owners of property abutting on that new street.

Our decision depends upon whether a new street can be formed by adding, and dedicating to the public, a longitudinal strip of land alongside of an old street. The Divisional Court has answered this question in the affirmative, upon the authority of two cases which, if rightly decided, are quite in point; whether right or wrong, those decisions have been acted upon in many other cases, and it would be dangerous for us to intervene and alter the law there laid down. Upon examination of them, however, I am clearly of opinion that they were well decided, and therefore the only question is whether they can be successfully distinguished. The first case, *Richards* v. *Kessick* (1), is, as regards its facts, indistinguishable from the present case, and is therefore, if rightly decided, absolutely in point. There was an old highway which was separated by a hedge from some fields at the side; the owners of the fields, wishing to turn them into building land, pulled down the hedge, threw a strip of land into the highway and dedicated it to the public, and built houses on their own land behind and abutting on the strip so dealt with. The Court held in that case that the parallel strip of land was by itself a new street, and that the local authority were justified in apportioning the expenses solely among the frontagers on the side of that new street. Is there any valid distinction between that case and the present? The appellants contend that there is, because there the proceedings were under the Public Health Act, 1875, while here they are under the Metropolis Management Acts. Sect. 150 of the Public Health Act, 1875, empowers a local authority to serve a notice to pave a street on the owners or occupiers of the premises fronting, adjoining, or abutting on "such parts thereof as may require to be paved," and it was argued that this amounted to an express

(1) 57 L. J. (M.C.) 48.

limitation of the liability to defray these paving expenses to the frontagers upon the part of the street requiring to be paved—that is, the new longitudinal strip; and that therefore the apportionment in *Richards* v. *Kessick* (1) was justified, but that there were no words in the Metropolis Management Acts to justify such an apportionment. But even assuming, which I do not admit, that the ratio decidendi of *Richards* v. *Kessick* (1) was as suggested, by s. 112 of the Metropolis Management Act, 1862, the definition of "new street" applies to and includes, not only all streets thereafter to be formed or laid out, but also "a part of any such street," and therefore we get by definition under these Acts the same result that we get out of the language of s. 150 of the Public Health Act, 1875, and if we substitute the words "part of a street" for "street," we get at the liability of owners of property abutting on part of a street as much in one case as in the other. In my opinion, the distinction sought to be drawn by the appellants between the liability of the frontagers under the Public Health Act, 1875, and the Metropolis Management Acts is not a tangible or valid distinction. The second authority upon which the judgment below was based is *White* v. *Fulham Vestry* (2), which is practically on all fours with the present case; the new strip of road corresponds to the footpath in that case, and there is no more power to make the owners of the cottages contribute to the expense of paving this new strip than there was in that case to charge part of the expenses of paving the footpath upon the frontagers on the far side of the road. I am clearly of opinion, therefore, that this appeal must be dismissed.

ROMER L.J. I am of the same opinion. The main argument of the appellants leads to this conclusion—that, if an old street is widened by a strip of land being thrown into it on one side, the whole becomes ipso facto a new street, and the local authority may deal with it on that footing, and may make the owners of houses abutting on the old portion contribute to the paving expenses. And it must go even further; for if the argument is sound, then in a case where a highway becomes

(1) 57 L. J. (M.C.) 48.

(2) 74 L. T. 425.

a new street by reason of houses being built on one side of it, and the new street is paved and the expenses apportioned among and paid by the owners and occupiers of premises on the side which is built upon, yet if the other side is widened by throwing in a strip of land the whole becomes a new street, so that the owners of the premises abutting on the side first built upon would be liable to a fresh apportionment in respect of paving the added portion on the other side. It cannot be that, where owners of premises abutting on a street are entitled to have the repairs to the street paid for by the inhabitants at large out of the rates, they can be deprived of that right because they are unable to prevent the owners on the opposite side from widening the street on that side. I think that the cases cited to us in argument which support the view I am taking were well decided. In the present case it is found as a fact that there was an old public highway which became a street before 1855 by reason of the erection of houses along the south side, and that, except for the widening in 1898, the street had not been altered in character or otherwise since those houses on the south side were built. That being so, it is an extravagant contention of the appellants that the whole had become a new street by reason of the widening and building on the north side. As regards the argument founded upon s. 98 of the Act of 1862, which provides for a minimum width of forty feet in the case of streets formed for carriage traffic, a simple answer is that the section was repealed by s. 215 of the London Building Act, 1894, and that the widening of this street was not until 1898. The substituted section (s. 9) of the Act of 1894 contains a very significant alteration of wording, and in effect authorizes a new street of less than that width unless the sanction of the local authority is refused within a specified time, and it is not improbable that the alteration was made in order to meet an argument based on s. 98 of the Act of 1862.

Then the appellants further say that, if their first contention is not the true view, the added portion became, as it were, absorbed in the old street, so that the whole became an old street. This means that the owner of a strip of land fronting a public road, repairable by the inhabitants at large, which land as it stands cannot be utilised for building, may throw the strip of land into the road, and by so doing, not only put himself in a position to develop his valuable building land behind the strip, but also throw all the expenses of paving, &c., upon the rates instead of bearing them himself. I cannot see any reason why such a gift should be made to him. There is no statutory enactment which requires us to hold that land which, by throwing an intervening strip into the street, is made to front what is in fact, as far as the strip is concerned, a new street, should be regarded as fronting an old street. There is nothing to prevent the added strip from being treated as being itself a new street, at any rate where the added strip is a substantial part of the whole street. Under the circumstances of the present case the contention that the whole became an old street is unsound. The appeal therefore fails.

MATHEW L.J. I am of the same opinion. It is contended that the case must be regarded in one of two aspects. First, that the whole of this street—that is, the original street and the strip thrown into it—is to be regarded as an old street, just as an old house to which a new room has been added would be regarded as an old, and not as a new, house. That seems to me a very fanciful way of looking at the matter. The other view is that the whole street has become a new street, because the addition communicated its newness to the whole. This argument depends chiefly upon s. 98 of the Act of 1862, and if it were the law still, no doubt it would help the appellants' contention; but I cannot regard it as an unimportant fact that the section is repealed, probably for the very reason that its operation was found to be working injustice. In my opinion, neither of the theories advanced by the appellants can be adopted, for neither theory is in accordance with the facts. This street in its altered form is not a new street, and it is not an old street, but it is an old and a new street combined. Why should not the added strip be looked upon as a new street? The clear result of so regarding it is to accept as good law the decisions in *Richards* v. *Kessick* (1) and *White* v.

(1) 57 L. J. (M.C.) 48.

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Fulham Vestry (1), both of which are in point. In the latter case the frontagers on the old street had been already dealt with, the expenses of paving having been apportioned among, and paid by, the owners on that side, upon which side only were there any houses; subsequently the owner on the other side, by arrangement with the vestry, threw a strip of ground into the street so as to widen it and provide a footpath, and the vestry apportioned the paving expenses upon the owners on both sides. The Divisional Court held the apportionment bad, upon the ground that the only new street was the footpath on the south side, and that as the owners on the north side did not abut upon the footpath they were not liable to contribute. I can see no real distinction between that case and the present, and no reason whatever for treating that decision, or the decision in *Richards* v. *Kessick* (2), as wrong. The appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *F. Du Bois.*
Solicitors for respondents: *W. W. Young & Son.*

(1) 74 L. T. 425.

(2) 57 L. J. (M.C.) 48.

W. J. B.

THE HORNSEY URBAN DISTRICT COUNCIL, APPELLANTS; HENNELL, RESPONDENT.

1902
March 25;
April 15.

Local Government—Streets—Paving, &c., Expenses—Liability—Crown—Prerogative—Exemption—Property held by Volunteer Corps for Military Purposes—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), s. 150—*Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65)—*Military Lands Act*, 1892 (55 & 56 *Vict. c.* 43).

The Crown, not being named in s. 150 of the Public Health Act, 1875, is not bound by its provisions, and is not liable under that section to pay in respect of property owned and occupied for the purposes of the Crown any expenses of paving, &c., a street on which that property abuts.

Land acquired and occupied by a volunteer corps for military purposes, and held under and subject to the provisions of the Volunteer Act, 1863, and the Military Lands Act, 1892, and vested in the commanding officer for the time being of the corps, is land owned and occupied for the purposes of the Crown. The commanding officer, therefore, is not liable in respect of it for any expenses incurred by a local authority under s. 150.

CASE stated, under the Summary Jurisdiction Acts, by six justices of the county of Middlesex.

At a Court of petty sessions, held in and for the Highgate Petty Sessional Division of the county, a complaint was laid by the appellants to recover from the respondent, under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the sum of 409*l.* 10*s.* 9*d.*, being the apportioned amount of expenses incurred by the appellants in sewering, levelling, paving, &c., a street, called Nightingale Lane (being a street not repairable by the inhabitants at large), within the appellants' district, which expenses were alleged to be payable in respect of property, called "The Elms," fronting and abutting upon Nightingale Lane.

The following statement of the material facts set forth in the case is taken from the judgment of the Court:—

The respondent, Colonel Hennell, is a colonel in His Majesty's army, and was up to the month of March, 1901, the commanding officer of the 1st battalion Middlesex Rifle Volunteers. In the year 1896 the respondent purchased the fee simple of certain land at Hornsey for the sum of 1910*l.*

The land was purchased by him for the purpose of its being transferred to and used by the volunteer battalion. In the year 1897 the premises so acquired were, pursuant to the provisions of the Military Lands Act, 1892 (55 & 56 Vict. c. 43), mortgaged to the Public Works Loan Commissioners for the sum of 2200*l.* The money so received was applied to repay the amount paid by the respondent in purchasing the premises and in fitting them up for the use of the volunteer battalion. The premises abut upon Nightingale Lane. In December, 1899, the appellants duly served notices for the sewering, paving, &c., of Nightingale Lane under the provisions of s. 150 of the Public Health Act, 1875. The work was subsequently executed by them. The amount apportioned, a sum of 409*l.* 10*s.* 9*d.*, is agreed to be the amount due from the respondent as the legal owner of the premises if he is not exempt from payment. The lands in question were acquired under and by virtue of ss. 24, 25, and 26 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65), and the mortgage, as already stated, was made under the provisions of the Military Lands Act, 1892.

At the hearing of the complaint before the justices it was contended for the respondent that the premises in question were owned and occupied by servants of the Crown for the purposes of the Crown, and consequently that the respondent was exempt from liability to pay any of the apportioned expenses.

The justices were of opinion that the respondent was not liable to pay the apportioned expenses, and dismissed the summons.

The question for the opinion of the Court was whether or not the respondent was liable to pay the share of the expenses apportioned upon him in respect of the premises in question.

Bray, *K.C.* (*Alexander Glen* with him), for the appellants. The justices were wrong in coming to the conclusion that the respondent was not liable. He is liable under s. 150 of the Public Health Act, 1875, as "owner" of the premises. By s. 257 expenses incurred by the local authority, for the repayment whereof the owner is liable under the Act, are made a charge upon the premises. By the Volunteer Act, 1863, s. 24, the officers and volunteers belonging to a volunteer corps may make rules, to be approved by a Principal Secretary of State, for the management of the property, finances, and civil affairs of the corps. By s. 25 all the property of a volunteer corps or regiment, including all lands acquired by the corps or regiment, "shall vest in the commanding officer of the corps or regiment for the time being, and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto." By s. 26 the commanding officer shall appoint a proper storehouse for the depositing and safe keeping of arms, ammunition, and stores supplied for the regiment at the public expense or by subscription. Under the provisions of that Act the property is clearly not Crown property. The Military Lands Act, 1892, s. 1, sub-ss. 2 and 3, gives power to a volunteer corps, and to the council of a county or borough, to purchase and hold land for military purposes. Sect. 2 incorporates the Lands Clauses Acts with certain exceptions and additions. By s. 3 "land acquired under this Act may be let by a volunteer corps, or if acquired by the council of a county or borough by that council, in any manner consistent with the use thereof for military purposes." Sect. 5 empowers a volunteer corps, under certain conditions, to "borrow such money as may be required for the purpose of the purchase by them of land under this Act." Sect. 8 provides that if a volunteer corps holding land under the Act be disbanded, the land shall vest in the Secretary of State from the date of the disbandment. The power of letting given by s. 3, and the provision in s. 8 that the land shall not vest in the Secretary of State until the disbandment of the corps, negative ownership by the Crown. To establish his exemption from liability it is not enough for the respondent to shew that the premises are occupied by servants of the Crown for Crown purposes if he is the legal owner. Such an occupation exempts from liability to pay rates, but not from an owner's liability under s. 150 of the Public Health Act, 1875. *Westminster Vestry* v. *Hoskins* (1) in principle covers this case, though the decision was on s. 75 of the Metropolis Management Act, 1855. The only exemptions from liability under s. 150 of the Public Health Act, 1875, are those specified in s. 151 with respect to incumbents, &c., of churches, chapels, or places appropriated to public religious worship, and in the saving clauses found in s. 327, which provide (sub-s. 2) that nothing in the Act shall be construed to authorize any local authority "to disturb or interfere with any lands or other property vested in . . . . Her Majesty's Principal Secretary of State for War for the time being." Those provisions exclude the presumption of any exemptions other than the specified ones. The rule that the Crown is not bound by a statute unless named in it does not apply where the statute itself specifies who are to be exempt from its provisions, and the extent to which the Crown is to be exempt. The decision in *Pearson* v. *Assessment Committee of Holborn Union* (1) turned upon the question whether premises occupied by a volunteer corps were premises occupied by servants of the Crown for Crown purposes, so as to be exempt from poor-rates. That case, therefore, is not in point here. [He also referred to *Hawley* v. *Steele* (2) and *Rayner* v. *Drewitt.* (3)]

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(1) [1899] 2 Q. B. 474.

Sir Robert Finlay, A.-G. (*Henry Sutton* and *G. S. Robertson* with him), for the respondent. The premises in question are the property of the Crown, because they are vested in servants of the Crown for the purposes of the Crown. Volunteers are servants of the Crown, and premises occupied by them for their military purposes are occupied for the purposes of the Crown: *Pearson* v. *Assessment Committee of Holborn Union.* (1) They are in the same position as the regular army or the militia. The Crown not being named in the statute (the Public Health Act, 1875) is not bound by s. 150. The principle that the Crown is not bound by statute unless named in it applies, not merely where a legal interest is concerned, but where there is a beneficial ownership by the Crown: *Perry* v. *Eames.* (4) It is not a sound principle of construction that where words of exemption are inserted in a statute they exclude the presumption of any other exemption. Exemption clauses of this kind ought to be treated, in construing a statute, as inserted ex majori cautelâ: *Smithett* v. *Blythe* (1) and *Mayor of Weymouth* v. *Nugent*. (2) Sect. 327 of the Public Health Act, 1875, is a mere provision against disturbing or interfering with certain public buildings, and does not affect the question. It is doubtful whether the local authority had any power to pave and sewer Nightingale Lane; but the fact that they have been allowed so to do cannot enable them to charge the Crown with the expenses.

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(1) [1893] 1 Q. B. 389.

(2) (1877) 6 Ch. D. 521.

(3) [1900] 82 L. T. 718.

(4) [1891] 1 Ch. 658, judgment of Chitty J. at p. 668.

There is no sound distinction to be drawn between the exemption of the Crown in respect of rates and its exemption in respect of an obligation to pay the expenses of sewering and paving under s. 150. In the Scottish case of *Lord Advocate and Barbour* v. *Lang* (3) it was held that the Crown, not having been expressly made liable by a local public Act, was exempt from the burden of maintaining a foot-pavement opposite its property, and that there was no distinction in regard to the Crown's right of exemption between a burden thus imposed and an assessment leviable for the same purpose. The principle of that decision applies here. The Crown is not named as one of the owners liable under the statute, and therefore is not liable—in the same way that, not being named in the statute of Elizabeth, it is not liable in respect of poor-rates. There is no difference in principle, for this purpose, between an assessment on occupation and an assessment on property: *Coomber* v. *Justices of Berks*. (4) In that case the House of Lords held that income tax was not payable in respect of assize courts and a county police station erected by the justices of a county and used for the administration of justice and for police purposes. In *Rex* v. *Cook* (5) the question was whether a person employed by the Government to forward Government despatches on the public service was liable to pay the post-horse duty imposed by 25 Geo. 3, c. 51. Lord Kenyon C.J. (1) thus stated the general principle as to the construction of statutes imposing charges as containing an exemption in favour of the Crown: "Now although there is no special exemption of the King in this Act of Parliament, yet I am of opinion that he is exempted by virtue of his prerogative, in the same manner as he is virtually exempted from the 43rd Eliz. and every other Act imposing a duty or tax on the subjects." The present case comes within that principle. *Westminster Vestry* v. *Hoskins* (2) is not directly in point here, but the decision was wrong in principle and inconsistent with the decision in *Pearson* v. *Assessment Committee of Holborn Union*. (3) Here the whole beneficial interest in the premises was vested in the Crown, and the respondent as a servant of the Crown is not liable.

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(1) (1830) 1 B. & Ad. 509; 35 R. R. 358.

(2) (1865) 5 B. & S. 22, judgment of Cockburn C.J. at p. 35.

(3) (1866) 5 R. 84.

(4) (1883) 9 App. Cas. 61: see judgment of Lord Watson at pp. 75, 76.

(5) (1790) 3 T. R. 519.

Bray, K.C., in reply. The respondent has more than "the bare legal estate" in the property, which is all that the justices had in *Coomber* v. *Justices of Berks* (4), and therefore Lord Watson's judgment does not apply to this case. Assuming that the Crown is owner, there is no distinction between the purposes for which these expenses have been incurred and sanitary purposes, and for sanitary purposes there is no good reason why local authorities should not have control over Government buildings. [He also cited *Felkin* v. *Herbert* (5); *Lord Colchester* v. *Kewney*. (6)]

Cur. adv. vult.

April 15. The judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was read by

LORD ALVERSTONE C.J. This was an appeal by the Hornsey Urban District Council against a decision of the justices of Middlesex, sitting at the Highgate Petty Sessions, dismissing a complaint made by the appellants against the respondents to recover the sum of 409*l*. 10*s*. 9*d*., being the apportioned amount of expenses incurred by the appellants in sewering, levelling, and paving a certain street, called Nightingale Lane, under the provisions of s. 150 of the Public Health Act, 1875. The ground of the decision was that, under the circumstances of the case, the respondent, who had acquired the premises in question as colonel of a volunteer corps, was not liable to pay the amount of the apportionment. In order to appreciate the point which arises upon this appeal it is, in our opinion, necessary to state accurately the facts upon which the question arises. [His Lordship stated the facts as previously set forth.] It was contended by Mr. Bray on behalf of the appellants that, inasmuch as by virtue of s. 3 of the Military Lands Act, 1892, the land could be let in any manner consistent with the use thereof for military purposes, and that it would not vest in the Secretary of State for War until after the disbandment of the corps, the respondent, as the legal owner, was liable to pay the apportionment, and that the case of the *Westminster Vestry* v. *Hoskins* (1) was an authority in his favour binding upon us.

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(1) 3 T. R. at p. 522.

(2) [1899] 2 Q. B. 474.

(3) [1893] 1 Q. B. 389.

(4) 9 App. Cas. 61.

(5) (1864) 11 L. T. 173.

(6) (1866) L. R. 1 Ex. 368; (1867) L. R. 2 Ex. 253.

It was contended on behalf of the Attorney-General that, the land being in fact purchased, owned, and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied for Crown purposes, and that, therefore, the amount of the apportionment could not be recovered, as s. 150 was not binding upon the Crown.

We are of opinion that the contention of the Crown is right, and that the appeal should be dismissed.

The liability to pay the apportionment depends upon the provisions of the Public Health Act, 1875. Sect. 150, as has frequently been pointed out, contemplates a notice being given to the owners or occupiers to carry out the work specified themselves, and, upon their failure to carry it out, empowers the authority to execute the work and recover the expense from the various owners. Sect. 213 provides that the expense may be treated as private improvement expenses, and recovered by means of private improvement rates spread over a series of years. Sect. 257 provides for the recovery of the apportioned

(1) [1899] 2 Q. B. 474.

amount either at once or by instalments. Sect. 327, which was relied upon by Mr. Bray, contains certain protective clauses with reference to lands vested in the Admiralty or War Office.

In our opinion, for the reasons given by Lawrance J. and Collins J. in the case of *Pearson* v. *Assessment Committee of Holborn Union* (1), these lands were being held for military purposes, and the respondent had no use or occupation of the premises other than as colonel commanding the corps, and in discharge of his duties as such, and is in fact a mere trustee for the corps having no personal beneficial interest. This is, in our opinion, an ownership and occupation for and on behalf of the Crown, and the appellants must shew some words which impose upon the Crown an obligation to do the work or pay the expense of it. The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is, in our opinion, still applicable to such a case. No doubt the insertion in many Acts of Parliament of clauses to protect the Crown, or save Crown rights, has given rise to the impression that this rule has to some extent been trenched upon, and we are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown even though the Crown may not be specially named. But, in our opinion, the intention that the Crown shall be bound, or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments, and there is, in our opinion, nothing of the kind in the provisions of the Public Health Act applicable to this case which gives rise to any such presumption. Nothing would be gained by considering in detail the various authorities which were cited in support of this view, but we would call attention to the judgment of Lord Tenterden in *Smithett* v. *Blythe* (2), in which, where there was an express exemption of King's ships of war from light dues, other vessels of the Crown were held not to be liable although they were not mentioned in the express exemption, or, in other words,

(1) [1893] 1 Q. B. 389.

(2) 1 B. & Ad. 509; 35 R. R. 358.

that the general doctrine of the immunity of the Crown applied notwithstanding the insertion of an express exemption clause as to certain matters. Similarly, in the case of *Mayor of Weymouth* v. *Nugent* (1), stone brought for the use of Her Majesty's navy was held exempt from wharfage duties created by statute upon the same principle, notwithstanding the insertion of special exemptions in favour of certain Crown property, and it was pointed out by Cockburn C.J. that these exemptions were merely inserted ex majori cautelâ; and the case of *Coomber* v. *Justices of Berks* (2), which was a case of income tax, is strongly illustrative of the principle. It is, moreover, right to observe that in the case of *Lord Advocate and Barbour* v. *Lang* (3) Crown property was held exempt from an exactly similar burden.

Having regard to the above authorities, we cannot accept the argument that the limited exemption of certain Government lands in s. 327 of the Public Health Act is sufficient to shew that all other interests of the Crown were intended to be affected by the provisions of the Act. The limited language of the exemption in s. 327 appear to us to support the view that they were inserted ex majori cautelâ, and we believe that, if careful search be made, there are many similar Acts in which no clauses protecting Crown rights have been inserted. There is, in our opinion, no such general practice as to lead to the view that the original doctrine of Crown exemption has ceased to exist, or has been infringed upon, or that the insertion of a particular protecting clause is intended to shew that only that class of Crown property was intended to be exempt. With reference to the case of *Westminster Vestry* v. *Hoskins* (4), relied upon by Mr. Bray, it certainly is not an authority upon the point now raised before us; but, after the argument which was addressed to us in this case, we are not prepared to say that we should have come to the same conclusion. The case of *Rayner* v. *Drewitt* (5) does not apply, as in that case the premises were not used solely for Crown purposes.

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(1) 5 B. & S. 22.

(2) 9 App. Cas. 61.

(3) 5 R. 84.

(4) [1899] 2 Q. B. 474.

(5) 82 L. T. 718.

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HORNSEY URBAN COUNCIL v. HENNELL.

For the above reasons we are of opinion that the appeal should be dismissed.

Judgment for the respondent.

Solicitor for appellants: *Leonard J. Tatham.*
Solicitor for respondent: *Solicitor of the Treasury.*

W. A.

C. A.
1902
May 1.

[IN THE COURT OF APPEAL.]

VAN GRUTTEN AND ANOTHER v. TREVENEN.

Landlord and Tenant—Agricultural Holdings—Notice to quit—Service—Registered Letter—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), s. 28.

The provisions of s. 28 of the Agricultural Holdings Act, 1883, as to the service of "any notice, request, demand, or other instrument under this Act" are applicable to a notice to quit.

APPLICATION for a new trial, or that judgment should be entered for the defendant.

The action was brought for the recovery of land of which the defendant was tenant to the plaintiffs from year to year under an agricultural holding. At the trial it was proved that a notice to quit had been sent to the defendant in a registered letter addressed to him at his place of abode, and that he had refused to sign the receipt for the letter when it was offered to him, and that the postman in consequence of this refusal took the letter back to the post-office. Judgment was entered for the plaintiffs. The ground of this application was that the notice to quit had not been properly served upon the defendant. The Agricultural Holdings Act, 1883, s. 28, enacts: "Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served."

J. A. Foote, K.C. (with him *J. A. Hawke*), for the defendant. The only way in which the Act affects a notice to quit is under s. 33, by requiring that a year's notice shall be substituted for a half-year's notice in such a case as the present. That provision comes under a heading distinct from that headed "Procedure," under which s. 28 is placed. The notice to quit is not a notice required by the Act: it is only a common law notice, the time for which is prolonged by the Act, and therefore it cannot be said to be a notice "under" the Act. This particular notice did not come into the hands of the defendant, nor was it left on the premises; and if s. 28 does not apply there was no proper service, and the defendant was entitled to judgment.

Lord Coleridge, K.C., and *Bodilly*, for the plaintiffs, were not called on.

VAUGHAN WILLIAMS L.J. We think that s. 28 of the Act applies, and consequently the service was good, and the appeal must be dismissed.

ROMER L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Collyer-Bristow, Hill, Curtis & Dods.*

Solicitors for defendant: *Robbins, Billing & Co., for Paige & Grylls, Redruth.*

A. M.

1902
April 15.

ELLIOTT *v.* LIGGENS.

Master and Servant — Compensation — Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37)—*Right of Workman receiving Compensation for Injury to Wages.*

A workman engaged at a weekly salary, who has claimed and received compensation under the Workmen's Compensation Act, 1897, in respect of partial incapacity for work resulting from injury received by him during the course of his employment, is not entitled to claim his wages during the time for which he has been incapacitated.

Appeal from the decision of the county court judge of Warwickshire sitting at Coventry.

On November 5, 1900, the plaintiff agreed to work for the defendant at a salary of 35*s.* per week and certain bonuses.

On July 11, 1901, he sustained an accident to his left arm in the course of his employment which temporarily disabled him.

On August 13 he gave notice of the accident to his employer, and claimed the allowance provided by the Workmen's Compensation Act, 1897. (1)

By agreement between the plaintiff and defendant, the defendant paid to the plaintiff during his incapacity 17*s.* 6*d.* a week, being 50 per cent. of his average weekly earnings.

On November 2 the defendant gave the plaintiff a week's notice to leave his employ on November 9.

The plaintiff then sued the defendant for the balance of his wages, 17*s.* 6*d.* a week, from July 11 to November 9.

The county court judge gave judgment for the plaintiff, and the defendant appealed.

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(1) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 1, sub-s. 1, "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . . be liable to pay compensation in accordance with the First Schedule to this Act."

By the First Schedule (1.), "The amount of compensation under this Act shall be . . . .

"(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings. . . ."

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Parfitt, for the defendant. The county court judge was wrong. The plaintiff by applying for and obtaining compensation under the Workmen's Compensation Act abandoned any right he had to claim his wages. This is shewn by the fact that the Act provides that the amount of compensation is to be fixed by the amount of the man's weekly earnings. There would be no need for compensation if the man was entitled to his full wages during incapacity. The object of the Act was to save the workman from having to prove negligence on the part of the employer, and he gets compensation for the loss of his wage-earning capacity. If what the Act gives him is merely damages for the injury he has sustained, and he is still entitled to his wages, the county court judge ought to have given him his full wages of 35*s*. per week, and not merely the balance.

Newson, for the plaintiff. The county court judge was right. It is plain that the defendant considered the contract of service to be still in existence, since he did not give notice of dismissal to the plaintiff till November 2. The incapacity to earn wages which is not due to any fault of the workman does not disentitle him to them: *Cuckson* v. *Stones*. (1) The Workmen's Compensation Act was not intended to affect the workman's right to wages, but only to give him compensation for injuries sustained by him in the course of his employment. So long as the contract of service existed the plaintiff was entitled to his wages, since he could not have entered into any other person's service.

LORD ALVERSTONE C.J. I think that this case is another illustration of that which I have endeavoured to express before, namely, that the Workmen's Compensation Act, 1897, does not contain express provisions purporting to deal with every case which can arise under the Act. I am not at all sure that it would be for the benefit of workmen generally that the argument for the plaintiff which the county court judge has adopted should prevail.

Sect. 2 of the Act provides that proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless due notice of the accident has been given, and other sections provide that the amount of compensation may be settled by agreement between the workman and the employer. By s. 1 (*b*) of the 1st schedule to the Act, where total or partial incapacity for work results from the injury, the weekly payment during incapacity is not to exceed 50 per cent. of the workman's average weekly earnings. The plaintiff in this case duly gave the proper notice, and by agreement with the defendants the maximum amount, that is to say, half his average weekly earnings, was paid to him during his incapacity. It seems plain from the sections to which I have referred, and from the fact of the plaintiff having given notice and received this weekly payment, that his conduct was inconsistent with the view that he was still entitled to the whole of his original wages. If the wages continue to become due during his incapacity to earn them, there would be no need for any inquiry under paragraph 2 of the 1st schedule as to the difference between the earnings before and after the accident, and as to whether there had been any payment by the employer other than wages during the incapacity. I think that a workman who takes the benefit of the Act on the ground of his incapacity to earn wages, and obtains compensation based on the footing of those wages, cannot turn round and say that he is entitled to the balance of his wages during the time in which he has been disabled from work and receiving compensation. I think, therefore, that the appeal must succeed.

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(1) (1859) 1 E. & E. 248.

DARLING J. I am of the same opinion. The right of a workman to make a claim for compensation under the Act is founded on the basis that, when his capacity to earn his wages has ceased because of the injury which he has sustained, money becomes payable to him calculated on a consideration of his weekly earnings which he has been receiving before he sustained the injury. The compensation is, therefore, payable in lieu of the wages which he has lost. If the contention of the plaintiff were correct, he would logically be able to sue for the whole of his wages during the time of his

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Darling J.

incapacity, and not merely for the balance after deducting the amount paid to him each week by way of compensation, for, according to the argument on his behalf, he is entitled to compensation for the injury he sustained, and also to his wages although he was incapacitated from earning them.

I think that the construction that we are putting upon the Act is not opposed to the interests of workmen in general, for, if the opposite construction were to prevail, the first act of every employer on hearing of an accident to a workman would be to discharge that workman from his employ, so as to prevent him from setting up a claim to his wages in addition to his claim for compensation for the injury.

CHANNELL J. I agree, and I think the best way of putting it is that the plaintiff, by claiming and accepting something which is absolutely inconsistent with his right to claim his wages, is estopped from saying that he is entitled to recover those wages. The only way in which he could do so would be by saying that his claim under the Workmen's Compensation Act was all a mistake, and that he abandoned it and gave credit to his employer for what he had received. But he has not framed his action in this way, and, as I said, I think he is estopped from now claiming the wages.

Appeal allowed.

Solicitors for plaintiff: *Maddocks & Colson, for Maddocks, Coventry.*

Solicitors for defendant: *Crowders, Vizard & Oldham, for Browetts, Coventry.*

A. P. P. K.

1902
April 15;
May 3.

READ *v.* THE FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND AND WALES AND OTHERS.

Action—Cause of—Inducing Breach of Contract—Justification—Bonâ fide but mistaken Belief in existence of Equal or Superior Right.

The justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself, and it will not be sufficient for him to shew that he acted bonâ fide or without malice, or in the best interests of himself or others, or on a wrong understanding of his own rights.

APPEAL from the county court of Suffolk.

The following statement of facts is taken from the judgment of Lord Alverstone C.J.

The action was brought against the Friendly Society of Operative Stonemasons for maliciously procuring and conspiring to procure to be broken an indenture of apprenticeship made August 11, 1900, between the plaintiff and the firm of Wigg & Wright, stonemasons, of Ipswich.

The facts are as follows: Read, the plaintiff (who was the son of a mason, a member of the defendant society), being a man of twenty-five years of age, and desirous of improving his capacity to earn wages, entered into the agreement of August 11 with Messrs. Wigg & Wright, by whom he had been previously employed as a labourer, whereby he covenanted to serve them for a period of three years at the wages of 15*s.* a week, which were ordinary labourer's wages; and they in return covenanted to the best of their skill and ability to teach and instruct him in the trade or business of stone and marble masons and all things incidental thereto. Messrs. Wigg & Wright and the men in their employ were members of the defendant society. Rule 6 of the working rules of that society was in the following words: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The plaintiff entered into Messrs. Wigg & Wright's service pursuant to the terms of the indenture of apprenticeship, working for them at the specified rate of wages, and, but for the action of the defendants, Messrs. Wigg & Wright would have carried out their part of the contract, and would have instructed him in accordance with the undertaking contained in the indenture. Messrs. Wigg & Wright were employing four masons, and had one apprentice besides the plaintiff.

On August 13, 1900, the defendant society resolved that if the plaintiff started work as a mason, or, in other words, if Messrs. Wigg & Wright commenced to instruct him in accordance with the terms of the indenture, one of their employees was to report the fact to the society within two hours. In consequence of the action of the defendants, Messrs. Wigg & Wright did not employ the plaintiff as a stonemason or instruct him in his trade; and upon the plaintiff remonstrating and asking that they would fulfil their agreement, the two letters of May 20 and 22, 1901, passed, the material part of which is that in the letter of May 22 the secretary of the defendant society told Messrs. Wigg & Wright that they protested against their introducing individuals not in the trade, and had empowered their members working for the firm of Wigg & Wright to take prompt action in the matter. It was admitted that prompt action meant that the defendants would authorize their members to give two hours' notice to quit Messrs. Wigg & Wright's service. The plaintiff, therefore, was not taught his trade owing to the action taken by the defendants.

The county court judge gave judgment for the defendants, holding that they had acted bonâ fide in the best interests of their society, and that they were not actuated by any improper motives, but had honestly endeavoured to enforce their construction of the rule.

The plaintiff appealed. On the hearing of the appeal the

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parties agreed that if the judgment was reversed the damages should be assessed by the Court.

Henlé, for the plaintiff. The county court judge was wrong. There was no sufficient justification for the defendants' interference with the plaintiff's contractual right with Wigg & Wright. In *Quinn* v. *Leathem* (1) it is laid down that it is a violation of a legal right to interfere without sufficient justification with contractual relations recognised by law. A person is liable if he knowingly and for his own ends induces another person to commit an actionable wrong, or if he uses illegal means to enforce his rights to the detriment of a third party: *Allen* v. *Flood*. (2) Here, even assuming that there was a binding contract between the defendants and Wigg & Wright, the defendants had no right to insist on its fulfilment to the detriment of the plaintiff: *Temperton* v. *Russell* (3); *Bowen* v. *Hall*. (4); *Lumley* v. *Gye*. (5) Self-interest is no justification for an illegal act, nor is bona fides. The motive cannot be taken into consideration: *Mayor, &c., of Bradford* v. *Pickles*. (6)

Chester Jones, for the defendants. The terms of the rules to which Messrs. Wigg & Wright had subscribed were part of their contract with the defendants. The defendants were, therefore, entitled to insist on that contract being carried out whatever might be the result to the plaintiff. No doubt in one sense every interference with the contractual rights of another is wrongful; but where a person has made inconsistent contracts, either party may force him to carry out the particular contract in which he is interested, although his doing so must compel him to break the other contract, and the person whose contract has been broken will have no right of action against the person inducing the breach. For instance, if a person contracts by separate contracts to sell the same article to A. and to B., A may insist on the fulfilment of the contract with him, although it necessitates a breach of the contract with B., and B. will have no right of action against A. There must, no doubt, be sufficient justification to exonerate a person who induces the breach of a contract, but a bonâ fide belief in his right is sufficient.

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(1) [1901] A. C. 495.
(2) [1898] A. C. 1.
(3) [1893] 1 Q. B. 715.
(4) (1881) 6 Q. B. D. 333.
(5) (1853) 2 E. & B. 216.
(6) [1895] A. C. 587.

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Henlé replied.

Cur. adv. vult.

May 3. The following judgment was read by

DARLING J. In this case the plaintiff sued the defendants for wrongfully and maliciously procuring to be broken an indenture of apprenticeship dated August 11, 1900, and made between the plaintiff of the one part and Messrs. Wigg & Wright, monumental masons, of the other part, and for unlawfully and maliciously conspiring together to procure the said indenture to be broken, and for unlawfully and maliciously conspiring together to molest and injure the plaintiff in his trade or calling, and for otherwise committing or procuring violation of the legal rights of the plaintiff. The plaintiff claimed damages and an injunction.

The case was heard before a county court judge on January 22 last, and the facts, so far as they are before us, appear to be these: By a deed of apprenticeship dated August 11, 1900, plaintiff was bound to Wigg & Wright for three years as an apprentice stonemason. He was employed and paid by them as a labourer, and was not learning the trade of a mason. All the men employed by Wigg & Wright were members of the trade union of which all the defendants are members. Wigg & Wright were parties to the rules of that trade union, and had signed them. Of those rules No. 6 is as follows: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average."

The letter of May 20, 1901, written by Wigg & Wright to the defendant Moss as secretary to the trade union, and his reply of May 22 sufficiently explain what was the action of the defendants as against plaintiff.

The letters are as follows:—

"Cemetery Road, Ipswich,
"20th May, 1901.

"To Mr. Moss, Secretary to the
"Friendly Society of Operative Stonemasons.

"Dear Sir,—As it appears we have inadvertently taken an apprentice contrary to the rules of your society (for which we are very sorry), we should be glad to give an explanation of how it occurred, as we had no intention whatever of infringing the rules.

"We had taken an apprentice before on the same condition with the exception of age (and note the rule says, 'And in no case to be more than sixteen years of age, except masons' sons and stepsons.' Now, this seems to us to entirely do away with limit of age, providing they are masons' sons. What else can it mean? The fact seems to be, this rule wants revising and made plainer, so that there could be no mistakes made in future.) When Mr. Read spoke to me about taking his son an apprentice, I told him we were not entitled to take another apprentice; but he said, 'Oh yes, you can take him, being a mason's son.' Now, this coming from a member of the society, we took it to be the meaning of the rule, and we never heard a word to the contrary; if we had, we should certainly not have taken this one. Well, now he has been bound just a year. We don't know if we are legally bound to keep him being over age, and we should not be at all sorry to get rid of him, although we should wish to behave honourably in the matter, and it seems to us the best way out of the difficulty would be to let him finish his time out; and we hope you will be able to view the matter in the same light, as we should be exceedingly sorry that there should be any unpleasantness between us and the society.

"Hoping for a favourable reply.

"We are,
"Yours respectfully,
"Pro Wigg & Wright,
"W. B. Wigg."

"22nd May, 1901.

"Dear Sirs,—Your letter of 20th was laid before the members of my society on that date, and I am instructed to inform you that you have misunderstood the meaning of the rule.

"It admits of a mason's son learning the trade without being bound apprentice; but we cannot understand a man twenty-five or twenty-six years of age claiming that right, nor an employer who would take him without first consulting us. Had you done so, we should have expressed our intention in the matter at once plainly.

"As the matter stands, we regret your firm has placed itself in a difficult position; but my members consider your action a direct infringement of the rule; and if the man in question starts working at the trade, we are bound to protest against you for introducing an individual not of the trade; and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest with us in any way.

"Yours truly,
"George T. Moss, Secretary."

These letters must be read with the defendants' answers to interrogatories 4 and 8, which are as follows, and which explain the prompt action referred to in this letter:—

"4. (*a*) At a meeting held 21st May, 1900, summoned for ordinary quarterly business, it was reported to the meeting that there was a man working at Messrs. Wigg & Wright's, named Mr. Read, bringing a mallet and tools, stating that he was going to be an apprentice, but he was still working as a labourer; but if he should start at the banker (it was noted on the minutes that), Brother Turner had a right to report the same.

"(*b*) At an ordinary fortnightly meeting held 13th August, 1900, it was reported that Mr. Read had been made an apprentice, but he had not started masonry. It was resolved that if he started work that two hours' notice should be given to Messrs. Wigg & Wright by members working there.

"(*c*) At an ordinary quarterly meeting held on 20th May, 1901, it was resolved that the secretary write to Wigg & Wright respecting L. Read entering the trade, his age being twenty-five years.

"(*d*) The said fortnightly meeting held on 29th July, 1901, was specially summoned in consequence of J. Read" (the father of the plaintiff) "writing his intention of visiting the meeting. Resolutions were passed as follows:—

"That J. Read be admitted to the lodge on his consenting to be duly read in as a member.

"That J. Read be allowed fifteen minutes to state his case of complaint re his son.

"That after hearing the explanation and arguments of Brother Read this society does not see any reason to recede from the position taken up by the society in the letter, dated May 22nd, sent to Messrs. Wigg & Wright.

"Carried, all present voted for, except J. Read.

"The meetings were held at the Friar's Head Inn, Ipswich; but I am unable to specify the names of all those who were present."

"8. The prompt action referred to in my letter referred to in paragraph 2 was that the masons in Messrs. Wigg & Wright's employ should give two hours' notice and leave Messrs. Wigg & Wright's employ if they thought it fit."

In consequence of the action taken by the defendants, the plaintiff was not taught the trade of a mason.

The learned county court judge held that the facts as proved or admitted before him fell short of giving any ground of action against the defendants; that the defendants seemed to have acted bonâ fide in the best interest of the society of masons, and were not in any way actuated by improper motives; that defendants gave a certain interpretation to rule 6 and acted upon it, and that though their interpretation might or might not be correct, yet, as it was honestly held, he did not consider they had acted improperly in their method of enforcing it.

It appears to me that this view is wrong, and that there should be a new trial. To my mind, the case presents itself thus. The plaintiff had entered into a contract by which he became entitled to demand of Wigg & Wright that they should teach him the trade of a stonemason. That was his contractual right. To interfere with that right may give a cause of action against him who does so. For this proposition there is much unquestionable authority; but it is enough to cite these words from the judgment of Lord Macnaghten in *Quinn* v. *Leathem* (1): "A violation of legal right committed knowingly is a cause of action, and . . . . it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

It was argued before us on behalf of the defendants that they had here such a sufficient justification, because they had themselves entered into a contract with Wigg & Wright, the terms of which were inconsistent with the contract between Wigg & Wright and the plaintiff.

It may well be that a person, or many persons acting in concert, would have a right to demand the fulfilment of a contract entered into with him or them, even though such fulfilment involved him who performed it in breaking a contract made by him with another person. Many examples may be put—for instance, a man who had affected to sell the same article to two separate purchasers could not possibly perform one contract without breaking the other, if both insisted on their rights, yet it could not render the purchaser, who insisted on his contractual rights, liable at the suit of the other purchaser.

But it may well be that the contract here alleged by the defendants is one which, if it were proved, is by reason of its being in restraint of trade or otherwise illegal, and incapable of being enforced; and in that case I think that to seek to hold Wigg & Wright to it could not be held "a sufficient justification for the interference" with the contractual rights of any one, i.e., in this case, of the plaintiff. Whether there was here a contract between the defendants and Wigg & Wright I do not think sufficiently appears upon the evidence. If in form

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(1) [1901] A. C. 495, at p. 510.

1902

READ
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SOCIETY OF
OPERATIVE
STONEMASONS
OF ENGLAND,
IRELAND
AND WALES.

Darling J.

there were one, it might still be illegal—as I have indicated—and to decide this it would be necessary to consider how far it satisfied these words of Sir W. Erle: "Every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." (1) These sentences are expressly adopted by Lord Brampton as part of his judgment in *Quinn* v. *Leathem.* (2)

It may be that the agreement alleged to exist between Wigg & Wright and the defendants is one which, unlawful otherwise, is legalised by the Trades Union Act, 1871; but that can only appear when it is ascertained exactly what are the terms of that contract and who were the parties to it. Moreover, when all this is ascertained, it may possibly appear that the defendants combined together to do things hurtful to the plaintiff, and not necessary to the mere enforcement of their own rights, contractual or other. As to this, the evidence before the county court judge is, I think, not sufficient to enable us to decide. On the new trial the Court should have regard to all these considerations.

To resume, I think the plaintiff has a cause of action against the defendants, unless the Court is satisfied that, when they interfered with the contractual rights of plaintiff, the defendants had a sufficient justification for their interference—to use Lord Macnaghten's words. This sufficient justification they may have had, and they may prove it; but the facts found by the county court judge and relied on by him as enough do not amount to one; for it is not a justification that "they acted bonâ fide in the best interests of the society of masons," i.e., in their own interests. Nor is it enough that "they were not actuated by improper motives." I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bonâ fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage.

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(1) Erle on Trade Unions, p. 12.

(2) [1901] A. C. 495, at p. 526.

CHANNELL J. I entirely agree in the judgment that has just been read by my brother Darling, and I do not think that it would be satisfactory for us to dispose of the case now by entering judgment for the plaintiff.

LORD ALVERSTONE C.J. read the following judgment:—I am clearly of opinion that the judgment of the county court judge in this case is not satisfactory; but the question upon which I feel considerable difficulty is whether or not the facts before us enable us finally to determine the question which is raised in the action. Speaking for myself, I should have been inclined to go further than my brothers, and, pursuant to the arrangement made at the hearing before us, to have assessed the damages and entered judgment for the plaintiff. [His Lordship then stated the facts as above, and continued:—]

The law in such a case seems to me to be clearly established. It is sufficient to quote the language of Lord Macnaghten already cited by my brother Darling. The same principle was enunciated by Erle C.J. in *Lumley* v. *Gye* (1) as follows: "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong," and expressed by Lord Watson in *Allen* v. *Flood* (2) in these words: "A person who procures the act of another can be made legally responsible for its consequences . . . . if he knowingly and for his own ends induces that other person to commit an actionable wrong."

In my opinion, the evidence establishes that in this case the defendants, instead of taking action against Messrs. Wigg & Wright for a supposed breach by them of the contract (if any) embodied in the rules of the association, did for their own ends procure and induce Messrs. Wigg & Wright to commit an actionable wrong—that is to say, to break the terms of a special contract made with the plaintiff.

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(1) 2 E. & B. 216, at p. 232.

(2) [1898] A. C. 1, at p. 96.

I have some doubt whether the arrangement embodied in the working rules is protected by the Trades Union Act of 1871; but it is possible that the terms of s. 3 of that Act are sufficient to prevent us from holding that, if the rule amounts to an agreement between Wigg & Wright and the defendants, it is void or voidable. In my opinion, the first part of the rule down to the words "sons and stepsons" has no application to the facts of this case. This was the case of a contract made by a man of full age in his own right, and not by or on behalf of a boy. The provision as to one apprentice to every four masons creates some difficulty; but I think that in that case also, assuming the arrangement embodied in the rule to be binding on Messrs. Wigg & Wright, the defendants had no right to bring pressure to bear to procure Messrs. Wigg & Wright to break their contract with the plaintiff. Whether they could have taken any other action against Messrs. Wigg & Wright is a question not before us.

There was no evidence to shew that the association or any of its members would in any way be injured by the plaintiff being taught the trade, or, in other words, by Wigg & Wright fulfilling their contract with him. The defendants' action was initiated at the lodge meeting of August 13, 1900, the further action on May 20, 1901, was by the secretary of the defendants' society, and the action threatened to be taken by Messrs. Wigg & Wright's men was to be empowered by the defendants' society.

In my opinion, these facts negative any suggestion that the action was taken on behalf of individuals to protect their own interests. For these reasons I think the county court judge ought to have entered judgment for the plaintiff; but, as my brothers are not prepared to go so far, there can only be judgment for a new trial.

New trial ordered.

Solicitors for plaintiff: *Leighton & Aldous, Ipswich.*
Solicitors for defendants: *Shaen & Roscoe.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.

1902

May 27;
June 2.

WIGHTWICK *v.* POPE AND OTHERS.

Practice—Security for Costs—Application for New Trial.

An order may be made for security for the costs of an application for a new trial.

Rule in *Heckscher* v. *Crosley*, [1891] 1 Q. B. 224, no longer to be followed.

APPLICATION by the plaintiff for an order for security for costs of a motion by defendants for judgment or a new trial.

Mackinnon, for the plaintiff.

G. A. Scott, for the defendants, referred to *Heckscher* v. *Crosley*. (1)

Cur. adv. vult.

June 2. The judgment of the Court (Collins M.R., Mathew L.J., and Cozens-Hardy L.J.) was read by

COLLINS M.R. This was an application made by the respondent in a motion set down in the new trial paper for security for costs of the motion. The case raised no point of any difficulty, and we were all of opinion that, in the ordinary discretion of the Court, security should have been ordered in the case, had it been technically a final appeal; but, having regard to the general rule of practice laid down in *Heckscher* v. *Crosley* (1), and since acted upon, not to grant security for costs in the case of new trial motions, we took time to consult the other members of the Court as to whether the time has not come when that practice should be altered. It has been more than once treated as anomalous: see *In re Harwood and Abrahams* (2); and, when analyzed, it does not seem to rest on any logical basis. In former days judgment was never given by the judge at nisi prius, who has been described as "only the instrument of the Court to try the issues raised":

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(1) [1891] 1 Q. B. 224.

(2) [1901] 2 K. B. 304.

see *Wells* v. *Abrahams* (1); and, where leave to move was reserved, the matter was suspended till the rule nisi could be moved for. Nowadays the judge has complete control of the cause, and can enter judgment as he thinks right. Hence there is now—unless the learned judge has declined to give judgment—a collateral or alternative application in every motion for a new trial asking the Court to deal with the judgment accordingly. There seems, therefore, no reason in principle why the Court should refuse to exercise its discretion in this class of appeals rather than in others, and, now that this Court has equal jurisdiction in all, it appears undesirable to act upon a hard and fast rule applicable to one class only, and laid down when this jurisdiction was first assumed. The forming of separate lists is a matter of convenience only, and the rights of the parties to security for costs ought not to depend upon which list the case appears in. All the Lords Justices concur in thinking that we ought not any longer to treat ourselves as bound by the rule laid down in *Heckscher* v. *Crosley*. (2) Security to the extent of 25*l*. must be given in this case within a fortnight.

Application granted.

Solicitors for plaintiff: *Nicol, Son & Jones.*
Solicitors for defendants: *Wontner & Sons.*

(1) (1872) L. R. 7 Q. B. 554.

(2) [1891] 1 Q. B. 224.

E. L.

THE KING *v.* JUSTICES OF WARWICKSHIRE.

1902
March 14, 26.

Justices—Costs of Appeal to Quarter Sessions—Payment by Treasurer of County or Borough—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 32.

By s. 29 of the Alehouse Act, 1828, upon a successful appeal under the Act to quarter sessions from a decision of justices, the justices in quarter sessions are empowered to order the treasurer of "the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment" to pay the respondent justices' costs.

A county borough had a separate commission of the peace, but not a separate Court of quarter sessions; it was not directly subject to the county rate, but under a financial adjustment made under s. 32 of the Local Government Act, 1888, it paid a fixed contribution towards the expenses of the county incurred in part on behalf of the borough, including the expenses of quarter sessions:—

Held, that the county borough, not having a separate Court of quarter sessions, and being liable to contribute to quarter sessions expenses, was not a place separate from the county, and therefore not a "place" within the meaning of s. 29 of the Alehouse Act, 1828; that the licensing justices had acted for the county, that their costs were costs of quarter sessions, and that the order of quarter sessions had, therefore, been wrongly made upon the borough treasurer, and should have been made upon the treasurer of the county.

RULE NISI at the instance of the corporation of Coventry directed to the keepers of the peace and justices in and for the county of Warwick, calling upon them to shew cause why a writ of certiorari should not issue to remove an order made by them at the quarter sessions holden by adjournment at the city of Coventry in and for the county of Warwick, and why the order, so far as it directed the payment of costs by the treasurer of the city of Coventry, should not be quashed.

The following facts appeared from the affidavits. Coventry is a city in the county of Warwick, and a municipal borough regulated by the Municipal Corporations Act, 1882, and a county borough within the meaning of that term as used in the Local Government Act, 1888, and has a separate commission of the peace, but has no separate Court of general or quarter sessions. Prior to 1842 Coventry had been a county of a city, with a separate Court of quarter sessions, but by 5 & 6 Vict. c. 110, s. 1, it was annexed to the county of Warwick, with a proviso for the grant of a separate commission of the peace. The justices of the county of Warwick hold a quarterly session of the peace at Coventry, by adjournment from Warwick, for the city of Coventry. The expenses of the city police force are defrayed out of the borough fund, and there is a treasurer of the city appointed under the Municipal Corporations Act, 1882. Under an order of the Local Government Act Commissioners, dated January 28, 1892, as to financial adjustments, the city of Coventry pays half-yearly to the county council of the administrative county of Warwick a fixed sum towards the expenses of the county incurred in part on behalf of the city, including the expenses of county buildings (among them being the County Hall, Coventry), assizes, quarter sessions, criminal prosecutions, coroners, and salaries and remuneration of county officers, including the clerk of the peace and the county treasurer. Under an arrangement between the city and the county council, embodied in the same order, fines received in respect of summary convictions by the city justices for offences committed within the city are paid to the borough fund, and an agreed sum in satisfaction thereof is paid half-yearly by the city to the county council.

At the adjourned general annual licensing meeting of the justices of the city of Coventry, held on September 15, 1901, one Mealand applied for a renewal of the full publican's licence held by him at the New Inn in that city, but the renewal was refused. An appeal was brought from that refusal to the Court of quarter sessions for the county of Warwick, and the appeal was heard at the quarter sessions, held by adjournment at the County Hall, Coventry, on October 17, 1901, when the city justices appeared as respondents. The Court of quarter sessions allowed the appeal, and granted the renewal of the licence. An application was then made on behalf of the respondent justices for an order on the county treasurer for their costs, but this was refused, and the Court of quarter sessions further ordered that the treasurer of the city of Coventry should pay to the respondent justices the sum of 34*l.* 5*s.* 8*d.* by way of costs. The present rule nisi was subsequently obtained on the application of the corporation of Coventry.

Roskill, for the justices of Warwickshire, shewed cause. The order was good. The case of *Reg.* v. *West Riding Justices* (1), which will be relied upon by the other side, is not in point. That depended upon s. 9 of the Vagrant Act, 1824, and was a decision that the word "place," as used in that section, meant a place having a separate Court of quarter sessions; it is no authority in cases arising under the Licensing Acts. The costs of licensing justices upon the reversal of their decision at quarter sessions are dealt with in the latter part of s. 29 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), which empowers the Court of quarter sessions to order the treasurer of "the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment" to pay the justice's costs. The word "place," as used in that section, must under the circumstances of the present case mean "borough," whether it has a separate Court of quarter sessions or not. The ratio decidendi of *Rex* v. *Amos* (2) and *Winn* v. *Mossman* (3) was that the borough justices were acting for the county, and under such circumstances it might be right that their costs on the appeal should be paid by the county treasurer; but in the present case they were not so acting; as borough justices they had exclusive jurisdiction over applications for licences: see Alehouse Act, 1828, s. 1; Licensing Act, 1872, s. 38. No question of the application of penalties can arise in the present case, for there are no penalties; the fees paid on licensing applications go exclusively to the clerk to the city justices. The contention of the county justices derives strength from the interpretation placed on the words "treasurer of the county or place" in s. 37 of the Alehouse Act, 1828, by which they are deemed to include "any officer acting in such capacity, or charged with the receipt and expenditure of moneys from and out of which the cost of public prosecutions have been usually defrayed."

(1) [1900] 1 Q. B. 291.

(2) (1819) 2 B. & A. 533; 21 R. R. 386.

(3) (1869) L. R. 4 Ex. 292.

F. Lowe, for the corporation of Coventry, in support of the rule. The principle of the decision in *Reg.* v. *West Riding Justices* (1) is applicable to this case, for the respective positions of the parties is precisely the same. The decision there was that the place for which the justice was acting meant the county, and the same meaning should be given in the present case to the language of s. 29 of the Act of 1828. In that case it is true that the fines inflicted by the borough justices were payable direct to the county treasurer; the only difference is that in the present case the fines and fees are paid to the city treasurer, and under the special financial adjustment they are commuted for a yearly payment of an agreed amount to the county treasurer; that is in substance a payment of the fines and fees to the county treasurer, as but for the agreement they would have gone to him directly. The reasoning in *Winn* v. *Mossman* (2) applies to the present case, and the county fund, which in substance gets the penalties and fees, should be liable to the costs.

[Channell J. Assuming that these costs were payable out of the county fund before the Local Government Act, 1888, what was the effect of s. 32 of that Act?]

It made no alteration, but left such alterations in matters of detail to be dealt with in the financial adjustment made under the section.

Cur. adv. vult.

March 26. The written judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was delivered by

Channell J. In this case a rule nisi was granted to bring up on certiorari, in order to quash it, an order of the justices of Warwickshire for payment by the treasurer of the county borough of Coventry of the costs of certain justices of Coventry as unsuccessful respondents to an appeal to the quarter sessions against their refusal to renew the licence of a public-house. The order was made under 9 Geo. 4, c. 61, s. 29, and it was admitted that the quarter sessions were bound to make an order for the payment of the justices' costs, but it was contended that it should have been made on the treasurer of the county of Warwick and not on the treasurer of the city of Coventry. The city of Coventry has had no Court of quarter sessions since 1842, when the Court was abolished by 5 & 6 Vict. c. 110, and it was made a county borough by the Local Government Act, 1888. The authorities quoted on the argument of the rule satisfied us that between 1842 and 1888 the costs of the justices of Coventry in such a case as this would have been payable by the county of Warwick and not by the city of Coventry, but we reserved our judgment in order to consider the effect of the city having become a county borough and of the financial adjustment which was made under the Act of 1888.

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(1) [1900] 1 Q. B. 291.

(2) L. R. 4 Ex. 292.

By 9 Geo. 4, c. 61, s. 29, the costs of justices are, in the event of a reversal of their decision, to be paid by the treasurer of "the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment"; and, by s. 37, "county or place" was defined as including amongst other things "town corporate." There have been a series of decisions shewing that "place" means a place having a separate Court of quarter sessions.

Prior to the Municipal Corporations Act, 1835, the question whether county justices had jurisdiction within a borough depended on whether there was a non-intromittent clause in the borough charter. In *Rex* v. *Amos* (1) it was held that in a borough not having such a clause, and where, therefore, the county justices had concurrent jurisdiction, the borough justices acted within the borough as justices for the county of which the borough formed part. By the Municipal Corporations Act, 1835, the grant of a Court of quarter sessions had a similar effect to a non-intromittent clause. In a quarter sessions borough the county justices had no jurisdiction, and in particular could not rate the parishes in the borough to the county rate. The quarter sessions borough paid from its borough fund to the county fund a money payment in respect of services rendered to it by the county at the expense of the county fund, but, not being directly rated to the county rate, it did not share in the burden of general county expenditure, and was for financial purposes separated from the county. On the other hand, a non-quarter sessions borough was subject to the jurisdiction of county justices, and its parishes were rated to county rates just as parishes in the county outside the borough were; such a borough was, therefore, for financial purposes, a part of the county. Accordingly, in Acts of Parliament in which such expressions as "county or place for which justices acted," or "county or place where an offence was committed," were used for the purpose of declaring to what fund fines or penalties should be paid, or from what fund costs should be paid, it has been uniformly held that "place" meant a place which had a separate Court of quarter sessions, and was thereby separated from the county for financial purposes.

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(1) 2 B. & A. 533; 21 R. R. 386.

The justices of a non-quarter sessions borough were held to act for the county of which their borough was part, according to the principle of *Rex* v. *Amos* (1), and the justices of a quarter sessions borough were held to act for their borough as a "place" separated from the county for financial purposes by being withdrawn from the jurisdiction of the county justices. Thus the quarter sessions borough paid the costs of its own justices when they were unsuccessful respondents to a licensing appeal, but, not being rated to the county rate, did not pay any share of the costs of justices of other parts of the county when such other justices were in the same position. On the other hand, the non-quarter sessions borough did not directly pay the costs of its own justices under such circumstances, but did pay through the county rate to which it was rated a share of such expenses both of its own justices and any other justices of places within the county other than quarter sessions boroughs. The authorities for these propositions are *Reg.* v. *Dale* (2), *Mayor of Reigate* v. *Hart* (3), and *Winn* v. *Mossman.* (4) The last of these cases is a very strong case, for the Court held, in order to arrive at this result, that the express words of 24 & 25 Vict. c. 75, s. 4, that "county or place" in the Licensing Act should include "every borough having a separate commission of the peace although it may not have a separate Court of quarter sessions," were controlled by the preamble of the Act, and were limited by it to enabling the justices in such boroughs to act in licensing matters.

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(1) 2 B. & A. 533; 21 R. R. 386.

(2) (1853) 22 L. J. (M.C.) 44.

(3) (1868) L. R. 3 Q. B. 244.

(4) L. R. 4 Ex. 292.

The law so far being clear, the only question we should have had to consider apart from the Act of 1888 would have been whether 5 & 6 Vict. c. 110 had placed Coventry in any different position from any other non-quarter sessions borough. We think it clear that it did not, for, although the jurisdiction of county justices was excluded for some purposes, the city was expressly made subject to the county jurisdiction as regards county rate, and this we think clearly brought it within the decided cases as to other non-quarter sessions boroughs. The Act of 1888, however, divided boroughs in a different way, and the having or not having a separate Court of quarter sessions became no longer the test of whether the borough was subject or not to county rate, and was or was not separate from or included in the county for financial purposes. County boroughs were created: a new class, or possibly an extension of the formerly very limited class, of cities and boroughs which were counties of themselves.

The new county boroughs, whether quarter sessions boroughs or not, are not subject to be rated to county rate. They pay, as quarter sessions boroughs formerly did, many contributions from their borough fund to the county fund for certain matters of common expenditure, but they are for general financial purposes separate from the county. The next class of boroughs, those with a population over 10,000 but under 50,000, are made subject to county rate whether quarter sessions boroughs or not, and they are now for general financial purposes part of the county, though exempt as to some particular matters. There is a third class, that of still smaller boroughs, with which we are not now concerned, but we may refer to the recent case of *Thetford Corporation* v. *Norfolk County Council* (1) as shewing their position. Speaking generally, the

(1) [1898] 1 Q. B. 141; [1898] 2 Q. B. 468.

effect of these alterations is that for many purposes "county borough" now stands in the position of a quarter sessions borough before 1888, and a non-county borough in the position of a non-quarter sessions borough.

What we have to consider is how far the position of the city of Coventry as regards the particular matter before us is affected either by the provisions of s. 32, and some other sections of the Act of 1888, or by the award of the Commissioners forming the financial adjustment between the borough and the county. By s. 32, sub-s. 1, certain liabilities are to cease, and compensation is to be given in the adjustment for their cessation. The adjustment between Coventry and the county of Warwick deals with fines and penalties, but not, expressly at any rate, with these costs of justices. By sub-s. 3 it further appears that the adjustment is as far as possible to prevent either body suffering loss by the altered arrangements, and in proviso (*b*) it is said that where the borough was not at the passing of the Act a quarter sessions borough (which is the case with Coventry) "the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county," and if a grant of quarter sessions should be thereafter made should redeem such liability. The costs of quarter sessions is defined in s. 100 in wide terms, and as including costs of prosecutions and the costs of defendants' witnesses, and "all other costs incidental to the quarter sessions." We think the costs with which we have to deal here must be considered costs of quarter sessions within this definition. They are the costs of one of the parties before the Court of quarter sessions, and as much costs of quarter sessions as costs of prosecutions or of defendants' witnesses. They are costs as to which the Court of quarter sessions has to make an order.

It appears, therefore, that Coventry has to contribute by a money payment towards costs, similar to those in question in the present case, incurred by justices of other places within the county; and, that being so, it would be only fair to hold, unless we were forced to do otherwise, that Coventry has not to pay the entire costs of its own justices when unsuccessful as respondents, but only a share of those costs by its contribution to quarter sessions expenses. These provisions of the Act of 1888 have somewhat altered the machinery for payment of quarter sessions costs, for Coventry is no longer directly subject to county rate; but if the view we take as to these costs being costs of quarter sessions is correct, it cannot be said that so far as regards the particular matter before us Coventry is financially separate from the county of Warwick any more than it was before the Act. We think, therefore, that we ought to hold, as we should have held but for the Act of 1888, that Coventry not having a Court of quarter sessions, and being liable to contribute to quarter sessions expenses, is not a "place" within the meaning of 9 Geo. 4, c. 61, s. 29—that is to say, not a place separate from the county, and that, as before the Act of 1888, the justices must be considered to have acted for the county of Warwick. The justices have at all events got jurisdiction within Coventry for the business reserved to them by the Act of 1842, except as to county rate, which alone was taken away by the Act of 1888. The doctrine of *Rex* v. *Amos* (1) may, therefore, still be applied to some extent.

The explanation of the matters with which we have to deal in the present case being left in as much doubt as they are is, I think, that the Legislature intended when the Act of 1888 was passed that all such details should be dealt with by the "financial adjustment." There were too many matters of detail involved in the changes made by the Act to make it possible for the Legislature to deal with them all, and accordingly they were intentionally left for adjustment between the parties or, if necessary, by the Commissioners or an arbitrator. We think therefore, although the point is not quite clear, if the costs in question are costs of quarter sessions, that an adjustment between Coventry and the county of Warwick expressly providing in some way for costs of justices under the section in question of the Act of 1828 (9 Geo. 4, c. 61, s. 29) would have been good and binding. The matter is not, however, dealt with in the adjustment, unless indeed the provision as to the fines and penalties being paid to Coventry carries with it the corresponding liability to these costs, which have always been considered to be payable out of the same fund as that to which the fines have to be paid. As to this, however, it may be said on the one hand that the fines and penalties belong under the Act to the county, and that the borough has purchased the right to them for a money payment, and on the other hand it may be contended that the Act of 1888 has transferred the right to these fines from the county to the borough, and that the money payment is the compensation payable under the Act for the right to the fines having been so taken away. The test, therefore, as to the fund which receives the penalties does not help us much in the present case.

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(1) 2 B. & A. 533; 21 R. R. 386.

The only case decided since 1888 on a similar point to that before us is *Reg.* v. *West Riding Justices* (1), in which the decision was given in accordance with the old authorities, and without any reference either in the arguments of counsel or in the judgments to the Act of 1888. As, however, the matter there in question was the actual costs of prosecutions at quarter sessions, it would be still more clear than in the present case that the Act of 1888 had not really affected the matter, and the decision is in accordance with our present view. That view is that, although the Act of 1888 has made very extensive alterations in the relation of boroughs to counties, it has not clearly provided that the liability to these particular costs should be transferred from the county of Warwick, which would have borne it prior to 1888, to the city of Coventry; and further that, as the city has to contribute to similar costs from other parts of the county, it is only just to assume that the liability was intended to remain with the county of Warwick. The order of quarter sessions was therefore wrong, and the rule should be made absolute.

Rule absolute.

Solicitors for justices of Warwickshire: *Field, Roscoe & Co., for Field, Leamington.*

Solicitors for corporation of Coventry: *Crowders, Vizard & Oldham, for Beard, Coventry.*

W. J. B.

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(1) [1900] 1 Q. B. 291.

Applied. MASON *v.* BURNINGHAM. [1949] 2 K. B. 545

PEARCE AND OTHERS *v.* BOLTON AND ANOTHER.

1902
April 17.

County Court—Costs—Remitted Action—Payment by Defendant to Plaintiff after Action brought—Sum "recovered in the Action"—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 116.

Sect. 116 of the County Courts Act, 1888, provides, with respect to actions brought in the High Court which could have been commenced in the county court, that if in an action founded on contract the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled to any costs of the action.

An action founded on contract having been brought in the High Court to recover 27*l.*, the defendants, after appearance, paid 8*l.* to the plaintiffs, no judgment or order of the Court having been given or made in respect of that payment. The action was subsequently remitted to the county court. In their particulars of claim in the county court the plaintiffs credited the defendants with the payment of 8*l.*, and claimed the balance—19*l.*; but the particulars did not shew that the payment had been made since action brought. The plaintiffs obtained judgment for 19*l.* in the county court, the judgment in form being for 19*l.*, and not for that sum in addition to the 8*l.* credited in the particulars :—

Held, by Lord Alverstone C.J. and Channell J., Darling J. dissenting, that, although it should have appeared on the proceedings that the plaintiffs had recovered 19*l.* in addition to 8*l.* paid since action brought, they had in substance recovered in the action a sum not less than 20*l.*, and were, therefore, not disentitled to their costs by s. 116.

APPEAL from an order made by the judge of the Birmingham County Court.

On July 26, 1901, the plaintiffs brought an action in the High Court of Justice for the amount due on a joint and several promissory note made by the defendants. The writ in that action was specially indorsed with a claim for 27*l.* 18*s.* 9*d.*, being the balance alleged to be due after crediting the defendants with various payments made before action brought. The defendants appeared to the writ, and shortly afterwards paid to the plaintiffs a sum of 8*l.* 15*s.* 3*d.* in respect of the amount due on the note. The action was subsequently, by order, remitted for trial to the county court, and the plaintiffs delivered particulars of claim, in which they credited the defendants with the payment of 8*l.* 15*s.* 3*d.* in addition to the payments before action, leaving a balance of 19*l.* 3*s.* 6*d.* The only date attributed in the particulars to the payment of 8*l*. 15*s*. 3*d*. was "1901." Upon the trial of the action in the county court, judgment was entered for the plaintiffs for 19*l*. 3*s*. 6*d*. Upon taxation of costs the registrar of the county court held that the plaintiffs had recovered in the action a sum less than 20*l*., and were therefore, under s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43) (1), not entitled to any costs of the action. On appeal to the county court judge he reversed the decision of the registrar, and granted the plaintiffs costs on Scale B.

The defendants now moved to set aside the county court judge's order.

Henlé, for the defendants. The decision of the county court judge was wrong. The 8*l*. paid by the defendants to the plaintiffs after action brought was not a sum recovered in the action within the meaning of s. 116 of the County Courts Act, 1888. The plaintiffs, therefore, are not entitled to any costs of the action. A sum can only be "recovered in the action" within that section if it is recovered by judgment, or some interlocutory order of the Court, or by some step in the proceedings which appears on the record. Here, although credit is given in the plaintiffs' particulars in the county court for this sum of 8*l*., it does not appear on the face of the proceedings that it was paid after action brought, or indeed that it was paid by the defendants at all. The sum "recovered" is the sum for which judgment is given—namely, 19*l*. only. It is not enough that the payment indirectly resulted from the issue of the writ in the action. "Recovered" means directly recovered by a proceeding in a court of justice: see *In re Humphreys, Ex parte Lloyd-George and George* (2), as to the meaning of "recovered" in s. 28 of the Solicitors Act, 1860.

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(1) 51 & 52 Vict. c. 43, s. 116: "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:—

"1. If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action . . . ."

(2) [1898] 1 Q. B. 520, judgment of Chitty L.J. at p. 525.

Under the rules drawn up under the Common Law Procedure Acts the defendants, in order to avail themselves in the action of this payment, must have pleaded it, and their pleading could not have been amended after judgment. Now the sum must be paid in accordance with the Judicature Acts and the rules and orders of Court made thereunder. When the 8*l.* was paid, the plaintiffs "recovered" nothing in the action, and all that they recovered afterwards in the county court was 19*l.*, for which they obtained judgment. Having brought their action in the High Court unnecessarily, the plaintiffs must strictly comply with the forms in order to get their costs. They should have refused to receive the 8*l.*, and required the defendants to pay it into court. It is no answer to say that the plaintiffs will suffer hardship. That is a matter for the consideration of the Legislature; effect must be given to the legislation as it stands: *Hewitt* v. *Cory*. (1)

J. R. Atkin, for the plaintiffs. The county court judge's decision was right. The 8*l.* was "recovered in the action." It was paid whilst the action was still in the High Court; but the amount, for the purpose of ascertaining the plaintiffs' right to costs, can be added to the sum which was recovered in the county court: *White* v. *Headland's Patent Electric Storage Battery Co.* (2), affirming *Keeble* v. *Bennett*. (3) A sum is recovered in the action within the meaning of s. 116 of the County Courts Act, 1888, if the defendant has paid it in consequence of the issue of the writ against him in the action. It is then recovered "by means of the action," which is the test stated in *Parr and Another* v. *Lillicrap*. (4) The form of the proceedings is for this purpose immaterial; the question is whether the plaintiff has in substance recovered the sum by means of the action.

Henlé replied.

CHANNELL J. I am of opinion that this appeal fails on the ground that in substance the plaintiffs have "recovered in the

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(1) (1870) L. R. 5 Q. B. 418, per Blackburn J. at p. 420.

(2) [1899] 1 Q. B. 507.

(3) [1894] 2 Q. B. 329.

(4) (1862) 32 L. J. (Ex.) 150.

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action," within the meaning of s. 116 of the County Courts Act, 1888, a sum not less than 20*l*. I agree that on the proceedings as they stand it does not appear that the plaintiffs have recovered that sum in the action. Two slips have been made in the form of the proceedings. The plaintiffs originally brought their action in the High Court for the balance due on the promissory note after giving credit to the defendants for certain sums paid by them. That balance was 27*l*. odd, and the whole of that sum has got into the pockets of the plaintiffs since they brought their action. After they brought that action they received from the defendants, as a payment made outside the court between the parties, the sum of 8*l*. odd, thus reducing the sum due to the plaintiffs, after giving credit for that payment, to 19*l*. odd. When the action was remitted to the county court the plaintiffs had to give particulars of claim, and in those particulars they included in the sums for which they gave credit this sum of 8*l*., and they claimed the balance —19*l*.—only. The date put against the sum of 8*l*. in the particulars was "1901." The action was brought in July, 1901, so that on the particulars the 8*l*. might have been paid either before or after the action was bought. Under the old system of pleading a plea that a sum had been paid without giving the date of the payment would be taken to mean that the sum had been paid before action. Although, so far as I know, there is no provision in the rules now in force that where undated matter is pleaded it must be assumed to have taken place before action brought, still that would, I should suppose, be the ordinary rule now; and if the matter pleaded took place after action brought, that fact should be specifically stated. If the plaintiffs had stated in their particulars that the 8*l*. for which they gave credit had been paid since the action was brought, and had claimed the balance—19*l*.—only, and had got judgment for that sum, then it would have appeared on the proceedings that they had got, since action brought, the whole sum they claimed—one part of it having been got by the payment of the 8*l*. before the action came into the county court, and the other part by the judgment in the county court. It would then have appeared clearly, I think, that the plaintiffs had recovered the whole sum of 27*l.* in the action, or by means of the action. But then the proper form of the judgment would be that they had recovered 19*l.* in addition to 8*l.* paid to them since action brought. That is what the proceedings ought to shew; and, if they had shewn it, the plaintiffs would have been entitled to costs. But the proceedings do not shew that. They may, or may not, have required amendment, but I do not think it is necessary on that account to say that the plaintiffs could not get their costs, because when the county court judge is applied to for an order for costs he must look at the facts; and if the facts shew that in substance 20*l.* or more has been recovered in the action, the plaintiff is entitled to an order for his costs. It was contended that where a sum is paid voluntarily by the defendant after action brought the plaintiff cannot be said to have recovered that sum in the action, and that at the particular date on which this 8*l.* was paid the plaintiffs had recovered nothing in the action. But I think that they recovered the 8*l.* when they recovered the 19*l.*, which was assessed and arrived at by taking into account the 8*l.* The case must be looked at as if the defendants had pleaded that since action they had paid 8*l.* on account. If that be the right view, it is clear that the plaintiffs recovered in the action the whole of their claim. Although I agree that some difficulty has arisen owing to the slips made with respect to the form of the proceedings, I think that the county court judge could deal with the matter of costs according to the facts which were before him. I am of opinion that in substance his decision was right, and that this appeal should be dismissed.

DARLING J. I regret that I am unable to agree with the conclusion at which my Lord and my brother Channell have arrived, and the more so because I am conscious that the view I take may appear technical. The action was for the balance—about 27*l.*—due on a promissory note. Having been brought in the High Court it was remitted to the county court, and before it was so remitted the defendants paid to the plaintiff 8*l.* The action went on in the county court, and the plaintiffs recovered the balance—19*l.* The judgment, therefore, was

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Darling J.

for less than 20*l*. Sect. 116 of the County Courts Act, 1888, provides with respect to actions which could have been commenced in the county court that the plaintiff, if in an action founded on contract he recovers a sum less than 20*l*., shall not be entitled to any costs of the action. It is said that the plaintiffs recovered a sum not less than 20*l*. here. The judgment was for less. The question is, Did they in the action recover the 8*l*. which was paid to them out of court by the defendants? There is no doubt that they received that sum after the writ in the action was issued, very likely in consequence of the writ; but did they recover it in the action? It seems to me that they did not. It was not paid into court, nor by virtue of any interlocutory order to pay it, nor upon any judgment. In my view, the amount for which judgment is given is the sum recovered in the action, and here that sum is 19*l*., and not 27*l*., because 8*l*. is not recovered in the action. My brother Channell has said that the 8*l*. was recovered in the action because the sum of 19*l*. was only arrived at by giving credit for the sum of 8*l*. I think the contrary inference must be drawn. To my mind, judgment was given for 19*l*. because that was all that was recovered in the action. I think there is authority to support my view. In *Parr and Another* v. *Lillicrap* (1) Martin B. said: "The real question in this case is, What is the meaning of the words 'shall recover' in the 11th section of the Act of Parliament?" (13 & 14 Vict. c. 61). "It seems to me, if a man brings an action and declares, and the defendant pleads and pays a sum of money into court, and the plaintiff goes to the court and gets it, that he 'recovers' it in the action; that is the common and ordinary good sense of the matter." I quite agree that, if the plaintiffs here had got the sum by going to the court and getting it, they would have "recovered" it in the action; but the sum was paid outside the court between the parties, and that fact, I think, makes all the difference. What was said by Bramwell B. leads to the same conclusion. He said (2): "Formerly there could be no recovery without a judgment. Every case at common law determined in favour of the plaintiff was determined by some

(1) 32 L. J. (Ex.) 150, at p. 151.

(2) 32 L. J. (Ex.) at p. 152.

sort of judgment. A new contrivance was introduced, and though you could not recover without a judgment before, you now can." Yes; but only by order of the Court, not when the payment is purely voluntary; in that case the payment was into court. Bramwell B. goes on: "Mr. Gadsden says this is a voluntary proceeding on the part of the defendant. It is voluntary in the sense that a man pays it rather than run the risk of being compelled to do it by further proceedings. But that might also be said of many payments after the money has been recovered under a formal judgment, for a defendant often pays voluntarily, in the sense that he pays to avoid the subsequent proceedings after judgment. The payment then, as in this case, is brought about by means of the action, and the plaintiff therefore recovers the amount." In the case before us there is nothing to shew that the 8*l*. was received by means of the action at all. It may be that it was the fact that the action had been brought which impelled the defendants to pay it; but I think that, in order to be recovered in the action, it must be paid by virtue of some legal process in the action. For that proposition authority is to be found in *Keeble* v. *Bennett*. (1) The action was to recover 104*l*., and the defendant, under an order made upon an application by the plaintiff to sign final judgment, paid 90*l*. to the plaintiff's solicitor. The action as to the balance of 14*l*. was transferred to the county court, and the 14*l*. was paid into court in the county court. It was held that the plaintiff had recovered 104*l*. in the action. Cave J. in delivering judgment said (2): "It is an action to recover 104*l*., of which 90*l*. has been paid to the plaintiff by virtue of proceedings taken while the action was still in the High Court, so that in the county court the plaintiff recovered 14*l*. only. The only question really is, Did the plaintiff recover 104*l*. in the action? I am clearly of opinion that he did, under an order made in the action while it was still in the High Court." There the plaintiff recovered the 90*l*. by an interlocutory order made whilst the action was in the High Court; but in the present case the plaintiffs did not recover the 8*l*. "by virtue of proceedings taken while the action was in the High Court,"

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(1) [1894] 2 Q. B. 329.

(2) [1894] 2 Q. B. at p. 331.

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although very likely they got that sum in consequence of having issued their writ. I am of opinion that they recovered in the action a less sum than 20*l.*, and, therefore, that they are not entitled to any costs.

LORD ALVERSTONE C.J. I agree with the judgment delivered by my brother Channell; but out of the respect I feel for my brother Darling's opinion I will state my reasons in my own language. The legislation in s. 116 of the County Courts Act, 1888, is not new; similar legislation was contained in the County Courts Act of 1867 (30 & 31 Vict. c. 142), and has continued in force since 1867. I think it is unreasonable to suppose that the Legislature in 1867 did not recognise the rule which then prevailed with respect to pleas raising a defence on facts occurring since action brought and pleas puis darrein continuance, namely, that you must look at and give effect to the substance of the matter which is pleaded. I think that when the Act of 1867 was passed the Legislature did bear in mind the rule as to matters occurring after action brought which could be pleaded as a defence in the action. If the action here had gone on in the High Court, the defendants, in order that judgment should not be given against them for the whole 27*l.*, must have pleaded payment of the 8*l.* and defended as to the rest. It is important to keep that in view in considering the true rights of the parties. It is said that the word "recovered" is used in s. 116 of the Act of 1888 in the sense of a sum having been obtained under an order of the Court, or by some formal step in the action. Remembering that the defendants, in order to avail themselves in the action in the High Court of the fact that they had paid 8*l.* to the plaintiffs since action brought, must have pleaded the payment of that sum as a defence, and remembering also that there are no pleadings in the county court, I think the true view is that you must look to the substance of the matter which could have been pleaded in the High Court. The county court judge had before him the writ in the action and the particulars in the county court. It is true that the particulars left the matter in doubt because they did not shew that the 8*l.* had been paid since action brought. If they had shewn that, it would have been equivalent to the confession by the plaintiffs of a plea by the defendants that the 8*l.* had been paid since action brought, and an admission that as to so much of their claim in the action the plaintiffs desired no further relief. It is admitted that the 8*l.* was paid since action brought; but it is said, and the registrar of the county court seems to have taken this view, that it was not a sum recovered in the action, because the defendants did not pay it into court, and the plaintiffs did not insist upon their doing so, and refuse to accept it unless they did. I am of opinion that in substance, whatever was the form of the judgment, it was a judgment for 19*l.* beyond the sum paid by the defendants since action brought, and therefore that the plaintiffs have recovered in the action a sum not less than 20*l.* I agree that the judgment ought to have been differently drawn up. I think that it ought to have been made to appear in the judgment that it was for 19*l.* over and beyond the 8*l.* which had been paid since action brought. *White* v. *Headland's Patent Electric Storage Battery Co.* (1) is an authority to shew that you may put to the amount recovered in the county court the amount recovered in the High Court before the action was remitted, in order to ascertain what is the amount which has been recovered in the action. The 27*l.*, which the defendants owed the plaintiffs when the writ was issued, has, in my opinion, been discharged partly by the amount paid since action brought and partly by the judgment in the county court. I should be sorry to decide this case on mere matters of form. Looking at the substance, I am of opinion that the plaintiffs have recovered in the action a sum not less than 20*l.*; that they are therefore entitled to their costs, and that this appeal should be dismissed.

Appeal dismissed. Leave to appeal.

Solicitors for plaintiffs: *Ralph Raphael & Co., for Blackham & Taylor, Birmingham.*

Solicitor for defendants: *T. Haynes Duffell, Birmingham.*

W. A.

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(1) [1899] 1 Q. B. 507.

1902
April 16.

EGHAM RURAL DISTRICT COUNCIL *v.* GORDON.

Highway—Extraordinary Traffic—Excessive Weight—Person by or in consequence of whose Order such Weight has been conducted—Highways and Locomotives (*Amendment*) *Act*, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12.

The defendant, being about to build a house, entered into a contract with a brick company to supply him with a quantity of bricks to be delivered at the place where he proposed to build. He gave no instructions as to the manner, time, or amount in which the bricks were to be delivered, and the company without his knowledge delivered them by means of a traction-engine and trucks, the excessive weight of which damaged the plaintiffs' roads to an extraordinary extent. In an action to recover the amount of the expenses to which the plaintiffs had been put in repairing the roads, the county court judge held that the defendant was not, within s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, the person "by or in consequence of whose order" such weight had been conducted over the plaintiffs' roads:—

Held, that the facts justified him in coming to that conclusion.

APPEAL from the decision of the county court judge of Surrey sitting at Chertsey.

The plaintiffs' claim was for damages, being the amount of the extraordinary expenses incurred by them in repairing certain roads by reason of the damage caused by excessive weight passing along them or extraordinary traffic thereon, and they alleged that it was by or in consequence of the defendant's order that such weight or traffic had been conducted within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898.

It appeared that the defendant was about to build a house in the plaintiffs' district, and in March, 1901, he gave an order to the Bracknell Brick and Tile Company for 250,000 bricks, to be delivered on the land where the house was to stand. The company, without the knowledge of the defendant, made arrangements with a contractor for the delivery of the bricks by means of a traction-engine and trucks, and it was admitted that the roads had been damaged by the use of the traction-engine and trucks, and would not have been damaged if the bricks had been delivered in carts in the ordinary way. The defendant gave no instructions as to the manner in which the bricks were to be delivered, and during the time of their delivery he was away. The county court judge held that the roads had been damaged by excessive weight, but that the damage was not caused by or in consequence of the defendant's order, and he accordingly gave judgment for the defendant.

The plaintiffs appealed. (1)

Macmorran, K.C. (*C. F. Pritchard* and *McCalmont Hill* with him), for the plaintiffs. The judge was wrong. The Act of 1878 was amended by s. 12 of the Act of 1898 precisely to meet such a case as this. In *Kent County Council* v. *Lord Gerard* (2) it was held that in a similar case it was the carrier and not the building owner "by whose order such weight or traffic had been conducted" within the meaning of s. 23 of the Act of 1878, and the amendment made by the Act of 1898 was intended to meet that difficulty. Possibly the contractor may also be liable, but the defendant was the person in consequence of whose order the excessive weight passed along the roads. He chose to give no directions as to the manner in which the bricks should be carried. The defendant would clearly be liable if the damage was caused by an excessive amount of ordinary traffic: *Epsom Urban District Council* v. *London County Council* (3); and the Acts make no difference between extraordinary traffic and excessive weight. [He referred to *Hill* v. *Thomas*. (1)]

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(1) By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, "Where . . . . it appears to the authority which is liable . . . . to repair any highway . . . . that . . . . extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon, such authority may recover . . . . from any person by whose order such weight or traffic has been conducted the amount of such expenses . . . ."

By the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1, "Sect. 23 of the Highways and Locomotives (Amendment) Act, 1878 . . . . shall be amended as follows . . . . (*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

(2) [1897] A. C. 633.

(3) [1900] 2 Q. B. 751.

Danckwerts, K.C. (*Cunningham Glen* with him), for the defendant. The only question is as to the meaning of the words added by s. 12 of the Act of 1898. "In consequence of" whose order does not mean "at whose instance" or "for whose benefit." What was done here was not in consequence of any order given by the defendant. It was not a reasonable or ordinary consequence of his order that the bricks should be sent by means of a traction-engine and trucks which would damage the roads by their excessive weight.

Macmorran, K.C., replied.

LORD ALVERSTONE C.J. This case, to my mind, is by no means free from difficulty. I have a strong suspicion that the suggestion made by Mr. Macmorran is right—that it was intended by the amending Act to make the person responsible for whom the goods had been carried in the ultimate result. Any way of attempting to enact this would probably give rise to the same difficulty, and that is why the particular language which has been used in the Act of Parliament may not have achieved the result for which Mr. Macmorran contends. I think it is difficult to say that the learned judge has gone wrong in law in this case, or has applied a wrong principle of law. He has decided that it is a case of excessive weight, by which I understand that unusually large loads have been brought by unusually heavy and powerful engines, and that that state of things was not caused in consequence of the defendant's orders, the words of the amending section being "any person by or in consequence of whose order" the thing was done. I think that must in effect amount to a finding that the particular way in which these bricks were carted and the particular vehicles which were used to convey them is in no way affected by any orders given by the defendant. It was not necessary that the materials should have been brought in that quantity, or in that way, or in that time, because of any order he had given as to the number of bricks that should be delivered, or where or

(1) [1893] 2 Q. B. 333.

when they should be delivered. That being so, it seems to me that the learned judge has negatived the allegation that the defendant was a person by, or in consequence of, whose order such weight of traffic has been conducted. If that is the true view of the learned county court judge's finding, without saying it is a pure question of fact, I do not think he has misdirected himself on any question of law; I think he has rightly considered the matter, and the only way in which the judgment can be impeached is by saying that he has put a construction upon those words which is too narrow or, at any rate, by saying he ought to have put a construction on them to the effect that, if any order had been given which led to the bricks being brought to the defendant's place, the words "in consequence of whose order" are wide enough to make the defendant responsible, because if he had not ordered the bricks they never would have come there. No doubt when one thinks that one appreciates why an amendment is made in an Act of Parliament one endeavours to see if the words carry out the object of the amendment. I come to the conclusion, however, on the facts of this case, that the learned county court judge was not wrong in holding that the damage to the road by the excessive weight was not in consequence of any order given by the defendant, but was in consequence of the vendors of the bricks having thought fit to choose this particular method of fulfilling their contract with the defendant. I think, therefore, that the appeal must be dismissed.

DARLING J. I am of the same opinion. It seems to me that to accept Mr. Macmorran's argument, with its logical consequence, would be to hold that whoever gave an order would be responsible for everything which was done by the person to whom he gave it. I think that the words "in consequence of" do not mean any more than "as a necessary consequence of" whose order. I think it is a matter to be gathered from the evidence whether what happened is a consequence of the order in the sense that it naturally, though not inevitably, followed from the order being given. The learned county court judge finds that what occurred here was not in

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EGHAM RURAL COUNCIL v. GORDON.

consequence of the order that was given; and I do not think we can say that he could not, in point of law, come to that conclusion. Therefore I agree that the appeal should be dismissed.

CHANNELL J. I also agree. The learned county court judge must be taken to have found that the damage was occasioned by the mode in which the vendors of the bricks chose to deliver them. I had a good deal of doubt myself about the matter until I saw that there was evidence that a larger quantity of bricks had been delivered on the same road in a different way without damaging it, and that I think explains his decision. I will only add that I do not think Bigham J.'s decision (1) quite covers this case, although it goes a long way towards doing so.

Appeal dismissed.

Solicitors for plaintiffs: *Wood, Bigg & Nash, for Dallas Brett, Egham.*

Solicitor for defendant: *A. M. Bradley.*

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(1) *Epsom Urban District Council* v. *London County Council*, [1900] 2 Q. B. 751.

A. P. P. K.

MAYOR, &c., OF WESTMINSTER, APPELLANTS *v.* THE ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY, LIMITED, RESPONDENTS.

1902
May 1.

Poor-rate—Procedure—Valuation List—Metropolis—Quinquennial Valuation—Effect of Omission to give Notice of Increase of Valuation—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 9, 45.

On the application for a distress warrant to recover the balance of a rate made by the appellants upon the respondents, it was contended that, as the appellants had failed to give the respondents notice of the increase in the rateable value of their premises as required by s. 9 of the Valuation (Metropolis) Act, 1869, the valuation list was not the valuation list for the time being in force in regard to them, and that they were only, therefore, liable in respect of a rate based on the rateable value of their premises as appearing on the previous valuation list:—

Held, that this was not an objection which could be taken on the application for the distress warrant, but must be raised by an appeal against the valuation list or against the rate.

CASE stated by a metropolitan magistrate.

The Army and Navy Auxiliary Co-operative Supply, Limited, who were the respondents, were at all times material the occupiers of certain premises in Caxton Street, in the parish of St. Margaret, in the city of Westminster. On April 12, 1901, a general rate was made and published by the appellants, the corporation of the city of Westminster, as overseers of the parish under and by virtue of the London Government Act, 1899. In this rate the respondents were assessed in respect of these premises at the sum of 33*l.* 2*s.* 9*d.*, being at the rate of 2*s.* 9*d.* in the pound upon a rateable value of 241*l.*, which was the rateable value of the premises as stated in the quinquennial valuation list for the parish made in the year 1900 under the Valuation (Metropolis) Act, 1869.

The sum of 33*l.* 2*s.* 9*d.* was accordingly demanded of the respondents, but they refused to pay more than 24*l.* 15*s.*, the amount due on the assessment of these premises as entered in the quinquennial valuation list for the parish made in the year 1895. The appellants took out a summons to recover the balance of 8*l.* 7*s.* 9*d.*, and on the hearing of the summons it was proved or admitted that this sum had been demanded and that the respondents were in occupation of the premises; but the respondents proved that no notice of an alteration in value in accordance with s. 9 of the Valuation (Metropolis) Act, 1869, had been served on them; and the appellants admitted that this was so, and that the respondents had had no notice of the raising of the value of these premises until April 12, 1901.

The respondents contended that they were not liable to pay the balance of 8*l.* 7*s.* 9*d.*, and that the entry in the quinquennial valuation list of 1900 was not binding on them, because no notice of the increase in their rateable value had been given to them as required by the section, and therefore that the quinquennial valuation list of 1900 was not the list for the time being in force, nor was it duly made in accordance with the Act. The appellants contended that they were entitled to a distress warrant to recover the sum of 8*l.* 7*s.* 9*d.*, because since the respondents had not appealed against the rate or the list on which it was based they were not entitled to dispute the validity of the valuation list on the hearing of the summons, and that, the rate being good on the face of it, the duty of the magistrate was merely ministerial, and, further, because the valuation list was not rendered invalid merely because no such notice as was directed by the section had been given.

The learned magistrate upheld the contentions of the respondents and refused to issue a distress warrant, but stated this case for the opinion of the Court. (1)

Marshall, K.C. (*Ryde* with him), for the appellants. The magistrate was wrong. His duty was merely ministerial; and,

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(1) By the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 9, "In each of the following cases, namely . . . . where the assessment committee . . . . alter a valuation list . . . . by raising the gross or rateable value of some hereditament comprised therein, the overseers shall immediately after the deposit or re-deposit of the list (as the case may be) serve on the occupier of such hereditament a notice of the gross and rateable value thereof inserted in the valuation list."

By s. 45, "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein. . . . ."

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when it was once shewn that the rate was in order and that the respondents were in occupation of the premises, he had no jurisdiction to refuse the distress warrant. By s. 45 of the Valuation (Metropolis) Act, 1869, the valuation list for the time being in force is to be conclusive of the value of the premises, and the failure to give notice under s. 9 does not affect its validity. Sect. 42 prescribes the time at which the valuation list is to be deposited, and the manner in which objections may be taken and in which it is to be approved by the assessment committee, and it has been held that those provisions are only directory and not imperative: *Reg.* v. *Ingall* (1); *Reg.* v. *Justices of London.* (2) The same is the case in regard to the provisions of s. 9. But even if the notice ought to have been given, the respondents ought either to have appealed against the valuation list under s. 32 of the Act of 1869, or to have come to this Court for a mandamus: *Bates* v. *Plumstead Overseers* (3); *Churchwardens of Birmingham* v. *Shaw* (4); *Bavin* v. *Hutchinson.* (5)

Bray, K.C. (*E. Hilliard* with him), for the respondents. No doubt the respondents might have appealed against the valuation list had they known of it, but they had no notice of the alteration in their assessment until it was too late for them to go before the assessment committee. If s. 45 means that as soon as a valuation list has been approved by the assessment committee it is to become the valuation list in force and to be deemed to have been duly made, grave injustice will be done. As Blackburn J. said in *Reg.* v. *Justices of Middlesex* (6): "Whether or not the valuation is binding on persons who have had no notice under s. 9 we are not called upon to decide, and I express no opinion, though it would seem but just that it should not affect them." The object of the Act was to establish a judicial procedure by which a valuation could be made which, when made, was to be conclusive; but it is essential to any judicial procedure that the parties affected should have notice so as to be able to put their view. Here no

(1) (1876) 2 Q. B. D. 199.

(2) [1893] 2 Q. B. 476.

(3) (1895) 64 L. J. (M.C.) 127.

(4) (1847) 10 Q. B. 868.

(5) (1862) 31 L. J. (M.C.) 229.

(6) (1872) L. R. 7 Q. B. 653, at p. 656.

notice of the raising of the assessment was received by the respondents until it was too late for them to go before the assessment committee, and therefore the list ought not to be held binding upon them. The respondents could not have come for a mandamus to compel the assessment committee to hear their appeal after the time for appealing had elapsed.

Ryde, in reply. Whatever view may be taken of s. 45, some hardship and injustice must result, since, if the respondents' view is correct, a new hereditament or one which has been increased in value would escape for five years if there had been any informality in the service of notices. It seems plain that the object of the Legislature was to prevent any mere defect in the service of the notice from invalidating the valuation list: see ss. 65 and 66 of the Act. Sect. 45, in using the words "The valuation list for the time being in force," refers back to the language of s. 43: "The valuation list as approved by the assessment committee . . . . shall come into force at the beginning of the year . . . . succeeding that in which it is made, and shall last for five years"; and s. 44 provides that the rate on the unaltered valuation list shall be levied notwithstanding a pending appeal against it. It seems plain, therefore, that the object of s. 45 was to cure all defects in the preliminary steps. [He referred to the Poor Rate Assessment Act, 1869 (32 & 33 Vict. c. 41), ss. 17, 18.] But any defect in the preliminary steps might have been raised on appeal. There could have been an appeal against the valuation list under ss. 11 and 32 of the Act of 1869. No doubt the appellants must go first to the assessment committee, and under s. 42 they would have been out of time for so doing when they first got notice of the increase of their rateable value. But they could then apply for a mandamus to the assessment committee to hear their appeal, and the Court would grant the mandamus where the appellants were out of time through the fault of the respondents: *Reg.* v. *Mayor of Rochester*. (1) That would get rid of any of the difficulties created by s. 42. The appellants, however, in addition to appealing against the valuation list, have the right of appealing against the rate under 17 Geo. 2, c. 38. That right exists unless it is specially taken away. No doubt by s. 45 of the Act of 1869 the valuation list is to be conclusive evidence of the value of the hereditaments included therein; but the list is not absolutely conclusive for all purposes. A similar argument was used to that now used for the respondents in *Overseers of Birmingham* v. *Shaw* (1), and Lord Denman pointed out that the right way of putting it was that if the overseers had jurisdiction to make a rate at all on an individual, then that individual's remedy was by appeal; but if the overseers had no jurisdiction to make a rate on the individual, then his proper remedy was to come to this Court. It is not every point that may be raised on an appeal that can be raised also in answer to the application for a distress warrant: *Bates* v. *Plumstead Overseers.* (2)

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(1) (1857) 7 E. & B. 910.

LORD ALVERSTONE C.J. This is one of those troublesome cases which not infrequently arise under this class of Act of Parliament, where the difficulty is to trace out what is the effect of a particular omission of some apparent condition precedent. In the view I take of this case, it is not necessary for us, any more than it was for Blackburn and Lush JJ. in the case of *Reg.* v. *Justices of Middlesex* (3), to decide what is the actual effect of the omission to serve the notice under s. 9. Personally I incline to the view that, for the purpose of making a rate, it is cured by s. 45, because, if not, nobody could safely make a rate without ascertaining that all the notices had been given. But I think that the decision of this case really depends upon the other considerations. It is argued that because no notice was given under s. 9 the valuation list for the time being in force cannot be deemed to have been duly made. The result of that, I think, would be that it would give very little effect to s. 45. Sect. 45 could scarcely mean that a valuation list, as to which all conditions have been fulfilled, shall be deemed to be in force. I think it probably has reference to the earlier section—43. That would not be

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(1) 10 Q. B. 868.

(2) 64 L. J. (M.C.) 127.

(3) L. R. 7 Q. B. 653.

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conclusive, because the respondents would be entitled to say that though it might save some conditions it did not save this particular one, which was the omission of the personal notice under s. 9. What would be the actual effect of the omission to give notice under s. 9 if the point were raised upon appeal and it was contended that the valuation list was to be conclusive and binding is, to my mind, a difficult point. I have only expressed my opinion as far as I have formed it, because, having heard arguments on the matter, I think I ought to state my view.

But it seems to me that the respondents are in this difficulty. This application to the magistrate was for the issue of a distress warrant. If the overseers—the persons who made the rate—were justified in acting upon the valuation list and making a rate, then the respondents must shew that the point is one which can be raised in objection to the issue of the distress warrant. Now, I think that a person is not entitled to raise, in answer to the application for a distress warrant, all the points which he could possibly have raised upon appeal. I quite agree that there are points which he can raise on both proceedings, as, for instance, non-occupation; but I do not think that because a matter may be raised on appeal, it follows that it can also be raised in answer to an application to issue a distress warrant. To a certain extent that principle was recognised in the case of *Overseers of Birmingham* v. *Shaw* (1), in which it was held "that a person exempt from poor-rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy made to enforce such rate, not appealed against." I think that was practically repeated by my brother Wills in the case of *Bates* v. *Plumstead Overseers* (2), in which he said: "The only objections, therefore, which can be entertained by a magistrate on an application for a distress warrant are the three following: that the property rated is not in the parish; that the party rated is not the occupier; and that the rate is on the face of it bad." It may be that those are not the only three objections which can be raised, but they point to the class of objections that can be raised on the application for a distress warrant. Lastly, in the very valuable judgment in *Overseers of Manchester* v. *Headlam* (1) Wills J. again pointed out in a considered judgment of the Court delivered by him how all these cases went back to the authority of *Crease* v. *Sawle* (2), which had decided that the rate, being good on the face of it, could not be impugned in an action for trespass for levying distress in respect of the rate. Wills J. said (3): "The objection being matter of appeal, the rate unappealed against ought to be enforced. It would be very unfortunate if it should be otherwise, and if by reason of an error, possibly of the most trifling kind, made by the overseers in the amount of property which they supposed to be in the occupation of a particular individual, he, after having forborne to avail himself of an ample and satisfactory remedy for any error to his prejudice in the rate, could evade payment of the poor-rate altogether. One cannot conceive a greater encouragement to improper litigation." Therefore, without pretending to say that those cases absolutely enumerate every point that can be taken, I think that they do lay down substantial rules which shew the class of points which can be raised in answering an application for a distress warrant, and that, primâ facie, points which may be raised on an appeal ought not to be raised then. With reference to the opinion of Blackburn J., which was cited from *Reg.* v. *Justices of Middlesex* (4), I incline to think that he was referring to the question whether or not the valuation should be conclusive upon an appeal. I do not think he had at that time in his mind the question of the issue of a distress warrant. Now, had the respondents the right of appeal? I think they had. I am not clear in my own mind that they had the right to apply for a mandamus. I admit that there is a close analogy with those cases where a mandamus has gone, the time having gone by within which a statutory body had to perform a statutory duty; but the point may be raised hereafter, and it is not necessary to decide it now; but I must say that, if the respondents are entitled to raise this objection and say that for the purposes of a rate this was not a good valuation list binding upon them, they ought to be able to raise that objection on appeal, and I think that that right of appeal has not been taken away. Of course, on the appeal there would have to be arguments upon the merits, and a decision upon the merits, as to whether or not the failure to give notice under s. 9 prevented the valuation list from being binding upon the respondents; but I think that point is one which ought to have been raised on appeal. I do not think it is the class of objection that the magistrate ought to entertain when application is made to him for the distress warrant, it being, as I have said, something which does not fall within those objections named, or objections of the same kind, but something which goes to the validity of the right to assess or rate at a sum of money all the persons named in the assessment. For these reasons I think the appeal ought to succeed, and that the magistrate ought to have issued his distress warrant.

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(1) 10 Q. B. 868.

(2) 64 L. J. (M.C.) 127, at p. 129.

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(1) (1888) 21 Q. B. D. 96.

(2) (1842) 2 Q. B. 862.

(3) 21 Q. B. D. at p. 100.

(4) L. R. 7 Q. B. 653, at p. 656.

DARLING J. I am of the same opinion. It seems to me that the whole question really turns upon the point whether the respondents had lost or been deprived by what took place of not only their right of appeal, but of their power of appealing. I think the argument has shewn that they have not; and that being so, injustice and hardship do not arise, and injustice and hardship were really the whole foundation of Mr. Bray's argument. If the case had been as unjust and as hard as he represented it to be, then, I think, we must have decided in his favour; but it seems to me he did omit to notice a remedy which was open to him, which has been pointed out to him very clearly by Mr. Ryde, and therefore the injustice which he apprehended does not occur.

CHANNELL J. This case is one of some little difficulty, but it really turns upon what is the true construction of this Act of 1869. The 45th section begins: "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act." Now the first question is what that means. It is suggested by Mr. Bray that "the valuation list for the time being in force" must mean a properly made valuation list, and that no other is in force. If it meant that, the section would read thus: "A valuation list duly made shall be deemed to have been duly made"; and that, of course, is a thing the Legislature would never have enacted, and could not possibly have enacted. It must mean something different from that. That being so, it seems to me that the valuation list for the time being is something different from that, and is something which, although not in fact duly made in accordance with the Act, is to be deemed to have been duly made in accordance with the Act. If so, what does it mean? It seems to me the valuation for the time being in force—the importance is rather on the words "the time being"; the "in force" is simply repeating the expression which had been used in s. 43 a little time before—that in substance the expression "the valuation list for the time being in force" means this: after the time when the valuation list is to come into force according to the preceding section, and until the moment when the next valuation list has come into force, the valuation list shall be deemed to have been duly made. It is a case of time rather than anything else, and in substance it comes round to what was suggested some time ago, that it refers to a de facto valuation list in existence at a particular time, and then that de facto list is to be deemed to be made in accordance with the Act; the provision in question obviously is intended to cure for some purpose or another possible defects in the list, and it goes on to say it shall be conclusive for certain purposes. Now, if conclusive for certain purposes is conclusive for all purposes whatever, of course it is obvious that this defect cannot be raised in answer to the application for the distress warrant. If, on the other hand, it is not conclusive for that purpose, it seems to me an a fortiori case that it would not be conclusive for the purpose of an appeal; so that either there is no remedy here and no answer to the distress warrant, because it is conclusive for all possible purposes, or there exists an appeal. If there does exist an appeal, I think it is quite clear on the cases my Lord has referred to that this would come within the class of cases where, there being a

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Channell J.

possibility of appeal, there must be an appeal, and if the point is not raised by appeal it cannot be raised on the application for the distress warrant. As I have said sometimes, I think those cases all depend on whether there is jurisdiction in the rating authority to make the rate, and whether the rate is good on the face of it. If the rating authority had jurisdiction to make a rate, any objection to the rate not apparent on the face of it cannot be raised on the application for the distress warrant. Such a rate as that it is the duty of the magistrate to enforce, and all the cases where the objection can be taken upon the distress warrant—the well-known cases of non-occupation, property out of the parish, and so on—are merely instances of cases in which the rating authority had no jurisdiction to make a rate upon a person or upon the property, as the case may be. The result seems to me to be that the argument for the appellants prevails, and that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Allen & Son.*

Solicitors for respondents: *Tyrell Lewis, Lewis & Broadbent.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1902
May 13.

In re AN ARBITRATION BETWEEN THE BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED, AND THE PONTYPRIDD WATERWORKS COMPANY.

Lands Clauses Acts—Compensation—Arbitration—Preventing the Working of Coal Mines—Notice to treat—Rise in Value of Coal after Notice to treat, whether Arbitrator can consider in assessing Compensation.

In an arbitration under the Lands Clauses Acts and the Waterworks Clauses Act, 1847, to assess the compensation payable to the owner of coal mines in respect of his being prevented from working seams of coal lying under and near to the reservoir of a waterworks company, the arbitrator is not entitled to take into consideration as an element in determining the amount of compensation to be paid a rise in the value of coal which has occurred between the date of the company's notice to treat and the making of his award.

Judgment of the King's Bench Division, [1901] 2 K. B. 798, reversed.

APPEAL from the decision of a Divisional Court (Ridley and Phillimore JJ.) (1), on a case stated by an umpire in his award made in a reference for the purpose of assessing compensation under the Lands Clauses Acts.

The following material facts were stated in the award:—

The Bwllfa and Merthyr Dare Steam Collieries (1891), Limited (hereinafter called the coal company), were the lessees of certain mines and seams of coal in the county of Glamorgan, lying under a portion of a reservoir authorized to be made under the Pontypridd Waterworks Act, 1892, by the Pontypridd Waterworks Company (hereinafter called the waterworks company), and other lands within the distance of forty yards from the reservoir on one side thereof.

By a notice in writing dated September 2, 1898, under the hand of their secretary, the coal company, being desirous of working one of the seams of coal lying under the reservoir and under the lands within the distance of forty yards from the same, gave notice to the waterworks company that they

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(1) [1901] 2 K. B. 798.

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would, after the expiration of thirty days from the service of the notice, begin to work that seam, unless in the meantime the waterworks company should signify their willingness to make compensation therefor.

By a notice in writing dated October 15, 1898, under the hand of their secretary, the waterworks company, under the provisions of the Pontypridd Waterworks Act, 1892, and of the Lands Clauses Acts, and other Acts respectively incorporated therewith (1), gave notice to the coal company that they were willing to make compensation to the latter for their estate and interest in so much of the seam of coal as the waterworks company required the coal company to leave unworked, and demanded particulars of their estate and interest and of their claims in respect thereof, and, further, gave them notice that if for twenty-one days after the service of that notice they failed to state the particulars of their claim, or to treat with the waterworks company in respect of the coal, the amount of compensation payable to them would, by virtue of s. 21 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), be settled in the manner provided by that Act.

By a notice in writing dated March 2, 1899, under the hand of their secretary, the coal company sent the required particulars to the waterworks company, and gave them notice that, unless they were willing to agree to pay to the coal company the sum of 6084*l.*, the coal company desired to have the amount of compensation settled by arbitration under the Lands Clauses Consolidation Act, 1845.

The waterworks company refused to pay the coal company the sum of 6084*l.*

Two arbitrators and an umpire were appointed for the coal company and the waterworks company respectively, and, after several extensions of time for making the award, the time was extended until April 30, 1901. The arbitration commenced shortly before that date, and whilst it was proceeding it was agreed between the parties, with the consent of the two arbitrators, that the arbitrators should retire, and that the umpire should sit alone during the remainder of the reference, and give his award alone; and he accordingly thenceforth took upon himself the sole burden of the reference.

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(1) The Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), incorporated the Lands Clauses Acts and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). The notices set forth in the award were given under ss. 22, 23 of the latter Act. Sect. 25 provides that if any dispute arise as to compensation the same shall be settled by arbitration in manner provided by the Lands Clauses Consolidation Act.

Coal rose in value subsequently to the date of the notice of October 15, 1898.

The tenth paragraph of the award was as follows: "During the said reference the coal company claimed that in consequence of such rise the compensation to be paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the said part of the said mines, veins, beds, and seams which was possessed at the date of the said notice of October 15, 1898 (which basis is hereinafter called the first alternative), but on the basis of the knowledge of such value which was subsequently acquired (which last-mentioned basis is hereinafter called the second alternative)."

It was by consent arranged, during the progress of the reference, that the umpire should state, in the form of a special case for the opinion of the Court, the question whether the coal company were entitled to have the compensation assessed according to the first or according to the second alternative; and that he should determine what sums the coal company were entitled to receive from the waterworks company by way of compensation according to the first or according to the second alternative respectively.

The umpire made his award, dated April 26, 1901, in the form of a special case accordingly.

The question for the opinion of the Court was, whether the coal company were entitled to have the compensation assessed according to the first or according to the second alternative. If according to the first, the umpire determined that the coal company were entitled to receive as compensation 2950*l.*; if according to the second, 5650*l.*

The Divisional Court decided that the compensation ought to be assessed according to the second alternative, and gave judgment accordingly, and the waterworks company appealed.

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B. Francis Williams, K.C. (*Trevor Lewis* and *Hon. R. Coventry* with him), for the appellants. The first alternative is that which should be adopted. The umpire has to estimate the value of the coal at the date at which the notice to treat was given, namely, October 15, 1898, and he is only entitled to make use of the knowledge as to the price of the coal which was then available. The giving of the notice to treat makes a complete contract between the parties, except as to the price, which has ultimately to be ascertained, in default of agreement, by arbitration. No doubt expert evidence might be admissible on the question of the value of the coal, and those witnesses would be entitled to say that the price of coal was likely to rise; but expert evidence to the opposite effect would be equally available. If subsequent facts are to be allowed to be taken into consideration and the value of the coal thus increased, it may well be that the waterworks company would have done better not to have given a notice to treat at all, but, in view of the high price of coal, to have abandoned their reservoir and chosen some other spot for a new one.

The waterworks company did not purchase the coal by their notice to treat, but only acquired the right to prevent the colliery company from working that which they were otherwise entitled to work.

Abel Thomas, K.C., and *W. D. Benson*, for the respondents. The second alternative should be adopted. The umpire had to assess the compensation payable to the respondents for being precluded from working the coal. He had, therefore, to estimate how long it would take for all the coal under the reservoir to be brought to the surface, and therefore to arrive at the future value of the coal, and how much profit per ton the colliery company would have made on each lot of coal brought to the surface.

There was no contract between the colliery company and the waterworks company until the award, *Haynes* v. *Haynes* (1), and, therefore, all facts which come to the knowledge of the umpire before the award is made may be taken into consideration by him.

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(1) (1861) 30 L. J. (Ch.) 578.

The amount must be the same as if the coal itself had been actually purchased by the waterworks company, and not merely the right to prevent the respondents from working it; but the existing value of the coal at the date of the notice to treat is the price which it will fetch when it is brought to bank and sold, and the fact that coal has risen in price between the date of the notice to treat and that of the award is a material fact which the umpire ought to take into consideration.

VAUGHAN WILLIAMS L.J. The question that is raised in this case is whether or not the umpire ought to have taken into consideration in assessing compensation a rise in the market price of coal which has taken place between the dates of the notice to treat and the assessment of compensation. The umpire himself expresses the question thus in the special case. During the reference the coal company claimed that in consequence of the rise in the price of coal subsequently to the date of the notice to treat the compensation to be paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the coal under the reservoir which was possessed at the date of the notice (which basis he calls the first alternative), but on the basis of the knowledge of such value which was subsequently acquired (which basis he calls the second alternative). Then, having stated this question, the umpire goes on to say that the question for the opinion of the Court is whether the coal company are entitled to have the compensation assessed according to the first alternative or according to the second alternative.

The particular case in which this compensation has to be determined is set forth earlier in the case, and it appears that on October 15, 1898, the waterworks company gave notice to the coal company, not actually to purchase the land of the coal company lying under and near to the reservoir, but "that they were willing to make compensation to the coal company for their estate or interest in that part of the mines being beds and seams of coal as they required the coal company to leave unworked." The waterworks company, therefore, did not desire to purchase the coal, but the form of the notice they gave was

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BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED, AND PONTYPRIDD WATERWORKS COMPANY. *In re.*

Vaughan Williams L.J.

such that I cannot doubt that the measure of compensation ought to be exactly the same as if they had given notice to purchase it. If they had compulsorily purchased the coal, the basis on which the compensation to the coal company would have been assessed would have been that of their expulsion from the land. If they are debarred by the action of the water company from working their coal under and near the reservoir, I take it that the damage to the company must be assessed on the same basis—that of expulsion from the land. It cannot be doubted now that the measure of damages to be applied must be taken as of the date of the notice to treat. But what is it which is really suggested here on behalf of the colliery company? They suggest that although they must of necessity take the valuation as of the date of the notice to treat, yet that they are entitled to take into consideration in estimating that value a subsequent rise in the price of coal. The price of coal may rise or fall according to contingencies which no one can anticipate and no one can foresee. Admittedly the umpire in assessing the amount of compensation has to arrive at the present value of the coal at the date of the notice to treat, but it is claimed that he is entitled to take into consideration contingencies which have occurred after the notice to treat and before the assessment—contingencies of which it would be impossible for any one to form a correct estimate. Because such a contingency has occurred, it is said that it can be dealt with as something which the umpire could have taken into consideration and weighed as affecting the value at the date of the notice to treat. I cannot agree with that contention. The umpire has to assess the present value of the coal at the date of the notice to treat. He has, therefore, to ascertain its present value, and he can only take into consideration things which cannot only be anticipated as possible at the date of the notice to treat, but must also be things which are capable of being measured at that time. It seems to me, therefore, that the true rule is that, in assessing the compensation, the umpire may and ought to take into consideration every circumstance which is in existence as a fact at the moment when the notice to treat is given, and not only those circumstances, but also the probable user which might be made of the property. If, for instance, he has to assess the value of land which is used as agricultural land, he is entitled to take into consideration its adaptability for building land, because that is a fact which is in existence at the time the notice to treat is given. If, after the notice to treat has been given and before the assessment, some inherent value in the land is discovered which was neither expected nor discovered at the time of giving the notice to treat, that circumstance would properly be taken into consideration, because it was, although unknown, a fact existing at the date of the notice to treat which affected the value of the property. But when it is proposed to take into account a contingency which cannot be anticipated and cannot be measured, that is quite a different thing, and I think such a contingency ought not to be taken into consideration at all. Practically the rule is the same as the ordinary rule for measuring damages for the breach of any contract: the value at the date when the contract ought to have been performed is to be taken into consideration, but not matters which are so remote or so uncertain that they are incapable of being measured. In my judgment, because the assessment was postponed and a contingency occurred, that is no reason for augmenting the value of the property which is being compulsorily acquired. I think that this appeal must be allowed, and that we must answer the question by saying that compensation ought to have been assessed according to the first alternative.

Romer L.J. I am of the same opinion. I gather, after some hesitation on the part of the respondents' counsel, that it is common ground that the compensation to be awarded by the umpire was the true value of the coal on October 15, the day on which notice to treat was given. I agree that in ascertaining that value the umpire may look at facts occurring subsequently to the notice to treat so far as they are material as shewing what was the value of the coal on that date, but not for any other purpose. The only circumstance referred to in the special case as having occurred since October 15, and as being material as throwing light on the true value of the coal at that date, is that coal rose in value subsequently to the date of the notice to treat. That seems to be the only circumstance which is considered material, and it is suggested that the valuation ought to be assessed on the basis of the knowledge of the value which was acquired subsequent to October 15. We have it, therefore, that the only circumstance which is relied on as tending to shew the true value of the coal on October 15 is that there was subsequently a general rise in the price of coal. That clearly means a rise in the price of coal as a general commercial article; and it is said that because it has risen in value since October 15, its value then ought to be estimated in the light of the higher value it subsequently attained. The rise in price might be due to many circumstances which could not by any possibility be expected or foreseen on October 15. It is impossible to say that the subsequent rise in the price of coal shews that the value of the coal as on October 15 was not the true value of the coal at that time. It is said that in estimating the value of the coal on October 15 expert evidence might have been given as to the prospective rise or fall in the price of coal. Even admitting for the moment that that might have been done, such expert evidence must be based on some facts existing at that date. If an expert witness can give no circumstances on which his opinion is based his opinion is valueless, and his evidence would not be received. Expert evidence is admissible in such cases, because the circumstances existing at that date might lead to results which could be foreseen by an expert and not of necessity by others; but the opinion of the expert must be based on facts. The value of the coal on October 15 must be taken, bearing in mind the chances of coal generally subsequently rising or varying in value; but to say that the price of coal generally subsequently rose, and that that is a fact which fixes the amount of the valuation, is equivalent to saying that the true value at that date must be disregarded because its value subsequently changed. That seems to me a wholly inconsistent proposition, and to hold that the subsequent rise in the price of coal ought to be received as affecting the award is, I think, unjustifiable. I am of opinion, therefore, that the Court below came to a wrong conclusion, and this appeal must be allowed.

MATHEW L.J. I am of the same opinion. It seems to me that the waterworks company might be treated as having purchased the coal by purchasing the right of support; but whether they purchased the coal or only the right of the colliery company to work the coal, the result is the same, and the damages can only be arrived at by estimate. There is no doubt, I think, as to the time at which that estimate is to be made. It is to be made at the time when the transaction takes place which gives rise to the claim for compensation—that is to say, in this case the date of the notice to treat. It is said that in ascertaining what was the value at that date the umpire is entitled to wait and see what subsequently happens, and therefore that in this case the value of the coal at the date of the notice to treat must be taken to be much increased by reason of the subsequent rise in the market price of coal. How can that be? In the course of the argument, I put to the learned counsel for the respondents the case of a rise in price due to a war which was utterly unforeseen at the date of the notice to treat, and asked whether that increase in price ought to be taken into consideration. He replied that it certainly ought; but when he was asked to suppose that, after the transaction giving rise to the claim and before the assessment, the subject-matter of the claim was damaged or destroyed, as, for instance, by fire, and it was put to him whether in that case the value as on the date of the notice to treat ought to be proportionately reduced, no satisfactory answer was obtainable.

In my opinion, the facts which are in existence at the time at which the claim arises ought properly to be taken into account, but not circumstances which subsequently arise and which have no connection with those facts, such as the subsequent rise and fall of the market.

I agree that this appeal must be allowed.

Appeal allowed.

Solicitors for colliery company (respondents): *Wrentmore & Son, for Frank James & Sons, Cardiff.*

Solicitors for waterworks company (appellants): *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

A. P. P. K.

1902
April 9, 10;
May 9.

[IN THE COMMERCIAL COURT.]

EDELSTEIN *v.* SCHULER & CO.

Negotiable Instrument—Debenture payable to Bearer—Usage—Conversion—Sale by Broker on Stock Exchange—Holder for Value.

Certain debenture bonds, some issued by an English company in England and others by foreign companies abroad, and expressed to be payable to bearer, and not being promissory notes, were stolen from the plaintiff by his clerk. For the purpose of selling the bonds, the clerk employed a broker at Bradford, who instructed the defendants, brokers on the London Stock Exchange. The defendants, acting in good faith, entered into contracts for the sale of the bonds to jobbers. The bonds were then sent by the broker to the defendants, who handed them to the jobbers and remitted the price received to the broker. In an action by the plaintiff against the defendants for conversion of the bonds, it was proved that, by the usage of the mercantile world and of the Stock Exchange, bonds of the kind in question are treated as negotiable instruments transferable by mere delivery:—

Held, that the bonds were negotiable instruments, and that when the defendants received the bonds they became holders for value.

Bechuanaland Exploration Co. v. *London Trading Bank*, [1898] 2 Q. B. 658, followed.

Held, also, that it is not now necessary to tender evidence to prove that bonds of the kind in question are negotiable instruments, that being a fact of which the Court will take judicial notice.

Action in the commercial list tried by Bigham J. without a jury.

The plaintiff claimed damages for the conversion of certain debenture bonds, his property. The defendants were stockbrokers and members of the London Stock Exchange. The bonds were issued by the following companies—the Bechuanaland Railway Company, Limited, the Mexican National Railroad Company, the Erie Railroad Company, the Union Pacific Railroad Company, the De Beers Consolidated Mines, Limited, the Denver and Rio Grande Railroad Company.

The Bechuanaland Railway Company was an English company, and its debenture bonds were issued in England, and were in the following form:—

"The Bechuanaland Railway Company, Limited.

"Share capital 6000*l.* in 6000 shares of 1*l.* each fully paid.

"Issue of first mortgage debentures of the company for 2,000,000*l.* all ranking pari passu and carrying interest at the rate of 5*l.* per cent. per annum pursuant to clause 19 of the articles of association and resolutions of the directors of the company passed the sixth day of September 1895 and the eighth day of July 1897 redeemable in accordance with the conditions indorsed hereon.

"Debenture. 10*l.*

"1. For valuable consideration already received the Bechuanaland Railway Company Limited (hereinafter called 'the company') will as and when the principal monies hereby secured become payable in accordance with the conditions indorsed hereon pay to the bearer or when registered to the registered holder on presentation of this debenture the sum of ten pounds with a bonus of 5*l.* per cent. thereon.

"2. The company will during the continuance of this security pay interest on the said sum of 10*l.* at the rate of 5*l.* per cent. per annum by equal half-yearly payments on every 1st day of May and 1st day of November in each year in accordance with the coupons annexed hereto and any further coupons issued pursuant hereto.

"3. This debenture is issued subject to and with the benefit of the conditions indorsed hereon which are to be deemed part of it.

"Given under the common seal of the company this 15th August, 1898."

The conditions indorsed on the debentures of this company were, so far as is material, as follows:—

"3. The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof.

"5. The delivery to the company of this debenture and of each of the said coupons and vouchers aforesaid shall be a good discharge for the principal moneys and interest therein respectively specified and the company shall not be bound to inquire into the title of the respective bearers of such instruments or to take notice of any trust affecting such moneys, or be affected by express notice of the right title or claim of any other person to such moneys or instruments. Nevertheless when registered the receipt of the registered holder or his legal personal representatives shall alone be a good discharge to the company for such principal moneys.

"6. Whenever this debenture is unregistered it is to be regarded as negotiable, and all persons are invited by the company and the owner for the time being to act accordingly; but the company will at any time upon the request of the bearer (whilst unregistered) register him or his nominee in the register below mentioned as the holder of this debenture, and indorse a note of such registration hereon, and the company will also at any time upon the request of the registered holder or his legal personal representatives, cancel the registration and the note indorsed hereon, and thereupon this debenture will again become transferable by delivery. A fee of 10*s*. shall be paid to the company upon every such registration or cancellation.

"8. Whilst registered, the registered holder will be regarded as exclusively entitled to the benefit of this debenture and all persons may act accordingly and the company shall not be bound to enter in the register notice of any trust or to recognise any right in any other person save as herein provided.

"9. Every transfer of this debenture when registered must be in writing under the hand of the registered holder or his legal personal representatives . . . .

"12. The principal moneys hereby secured shall immediately become payable:—

"(*a*) If the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the bearer hereof before such interest is paid, by notice in writing to the company calls in such principal moneys; or

"(*b*) If an order is made or an effective resolution is passed for the winding-up of the company; or

"(*c*) At the expiration of six calendar months from the time when this debenture is drawn for redemption pursuant to clause 25 of the indenture below mentioned, and the notice in that clause mentioned is given.

"13. The principal moneys and interest hereby secured will be paid at Parr's Bank, Limited, Bartholomew Lane, London, or at the registered office of the company."

The De Beers Consolidated Mines, Limited, was a company registered in the Colony of the Cape of Good Hope. The terms of its bonds were to the same effect as those of the above bond, except that they contained no provision as to registering the name of a holder of the bond. The principal moneys secured by the bonds were payable in London or Kimberley at the option of the company.

The Union and Pacific Railroad Company was an American company. By the terms of its bonds the company promised to pay to the holder of the bond, or, in case the bond was registered, then to the registered holder thereof, the sum of $1000 at the office of the company in New York, and interest thereon half yearly; on default in payment of the interest the principal became due. The bonds contained the following clause: "This bond shall pass by delivery or by transfer on the books of the railroad company in the city of New York; after registration of ownership certified hereon by the transfer agent of the railroad company no further transfer except upon the books of the said company shall be valid, unless transferred to bearer on said books, after which this bond shall pass by delivery as at first, but shall continue subject to registration and transfer to bearer successively at the option of each holder, such registration, however, shall not affect the negotiability of the coupons, but the same shall continue to be transferable by delivery notwithstanding registration of the bond."

The Erie Railroad Company and the Denver and Rio Grande Railroad Company were also American companies, and the bonds issued by them were to the same effect as the above.

The facts as stated by the learned judge in his judgment were as follows: "It appeared at the trial that the plaintiff, to whom these bonds belonged, kept them in a safe in his office. They were stolen from the safe by one of the plaintiff's clerks. This clerk then from time to time employed a broker named Megson, who traded on the Stock Exchange at Bradford, to sell the bonds. Megson in the ordinary way of business sold them through the defendants, who are stockbrokers carrying on their business on the London Stock Exchange. The bonds were sold to jobbers either for cash or for the account, and when sold they were sent to the defendants so that they might hand them to the jobbers in exchange for the price. When the defendants received the money, they remitted the amount to Megson, either in cash or in account current, and he in his turn paid the money to the clerk. It was admitted that the defendants had no notice of any infirmity in the vendor's title, and that they acted throughout with perfect bona fides. On discovering the theft the plaintiff brought this action."

Evidence was given on behalf of the defendants that the bonds in question and all others of a similar nature are treated by the Stock Exchange and by the mercantile world generally as negotiable instruments passing by delivery from hand to hand.

Danckwerts, K.C. (*Montague Lush, K.C.*, and *Waugh* with him), for the plaintiff. The case raises two questions. First, whether the bonds are negotiable instruments; and, secondly, if so, were the defendants holders for value. The defendants, as brokers, received the bonds from Megson, acting for the plaintiff's clerk, who was not a bonâ fide holder for value, in order that they might be handed over to the jobbers to whom the bonds had been sold. There never was any intention on the part of the plaintiff's clerk that the defendants should acquire any property in the bonds, and their position as brokers is entirely inconsistent with that of a holder for value. A broker is the agent of both parties to make a contract between them: *Southwell* v. *Bowditch*. (1) It is contrary to the nature of his employment that he should be a party to the contract. The defendants rely on the fact that they are members of the Stock Exchange, and it is sought to draw a distinction between the position of a broker who is a member of the Stock Exchange and other brokers. There is no such distinction. The contract with the jobber is made by the broker on behalf of a principal. The jobber can sue the principal on the contract: *Duncan* v. *Hill.* (1) It is true that by the rules of the Stock Exchange there is a liability on the part of the broker towards his jobber. That is not a liability arising out of the execution by the broker of his principal's contract; it arises out of the contract made by every member of the Stock Exchange at the time when he becomes a member. When the principal hands the securities to the broker to deliver to the jobber, the broker receives the securities merely as the agent of the principal. The principal is not bound to hand the securities to the broker. He may revoke his authority, and, if he does so, the only consequence is that he must indemnify the broker. Here the defendants acted on the mandate of Megson, who acted on the mandate of the clerk. The defendant's right and remedy is an indemnity from Megson: *Lacey* v. *Hill, Crowley's Claim.* (2) [He referred to *Cochrane* v. *Rymill* (3); *Hollins* v. *Fowler* (4); *Cranch* v. *White* (5); *Goggerley* v. *Cuthbert* (6); *Fine Art Society* v. *Union Bank of London* (7); *Glyn* v. *Baker* (8); *Arnold* v. *Cheque Bank* (9); *Barker* v. *Furlong* (10); *London and County Banking Co.* v. *London and River Plate Bank* (11); *Nash* v. *De Freville.* (12)]

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(1) (1876) 1 C. P. D. 374.

But even if the defendants were holders for value, that affords them no defence unless the bonds are negotiable instruments. It is submitted that they are not. The evidence of the witnesses only amounts to this, that these bonds are transferable by delivery. That is not sufficient to constitute negotiability. The same thing was said as to bills of lading; but they were held not to be negotiable instruments: *Thompson* v. *Dominy* (13); *Gurney* v. *Behrend.* (14) The true definition of a negotiable instrument is contained in Willis on the Law of Negotiable Securities, at p. 6, and is as follows: "A negotiable instrument is one the property in which is acquired by every person who takes it bonâ fide and for value, provided that the instrument is such and in that state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument." Apart from the ancient law merchant, usage cannot attach to an instrument the incident of negotiability contrary to the general law: *Crouch* v. *Crédit Foncier of England.* (1) A custom to be good must be legal; a custom to alter the law cannot be legal; therefore, the custom contended for in this case is illegal. The Legislature alone can create negotiable instruments: see, for example, 3 & 4 Anne, c. 9, which, after reciting that it had been held that promissory notes were not assignable within the custom of merchants, enacts that they shall be assignable in the same way as bills of exchange: see also 51 Geo. 3, c. 64, s. 4. The authorities do not support the contention that these bonds are negotiable instruments. *Gorgier* v. *Mieville* (2) was a case of a bond issued by a foreign Government, and the Court held, as a matter of law, that it was equivalent to a bill of exchange, and was, therefore, a negotiable instrument. It appears from the report in 4 D. & R., which is fuller than that in 3 B. & C., that the case was not decided on the ground of usage, and no question as to usage was left to the jury. In *Goodwin* v. *Robarts* (3) the question turned on scrip of the Russian Government, the argument being that there was a distinction between scrip, which only conferred a right to obtain a bond, and a bond itself. It was held that there was no such distinction, and, following *Gorgier* v. *Mieville* (2), that the scrip was a negotiable instrument. Although the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* (3) was affirmed in the House of Lords, the reasoning of Cockburn C.J. as to usage was not adopted. The House of Lords proceeded on two grounds: first, estoppel, which has no application to this case; secondly, that the case was covered by *Gorgier* v. *Mieville.* (1) The judgment of Lord Selborne entirely supports the argument for the plaintiff. In *Crouch* v. *Crédit Foncier of England* (2) the document was the debenture of an English company, and it was held that the debenture was not a negotiable instrument. That decision is conclusive of the present case. The judgment of Kennedy J. in *Bechuanaland Exploration Co.* v. *London Trading Bank* (3) proceeded on the erroneous assumption that *Crouch* v. *Crédit Foncier of England* (2) was overruled by *Goodwin* v. *Robarts* (4); and his judgment is also in conflict with the judgment of Lord Selborne in the latter case, and with the judgment of Manisty J. in *London and County Banking Co.* v. *London and River Plate Bank* (5), in which case Manisty J. expressly held that *Crouch* v. *Crédit Foncier of England* (2) is not affected by *Goodwin* v. *Robarts.* (4) [He also referred to the Companies Act, 1867, s. 27; *Mason* v. *Lickbarrow* (6); *Sewell* v. *Burdick* (7); *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue* (8); *Dixon* v. *Bovill* (9); *Rumball* v. *Metropolitan Bank* (10); *Colonial Bank* v. *Cady* (11); *Stern* v. *Reg.* (12)]

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(1) (1873) L. R. 8 Ex. 242.

(2) (1874) L. R. 18 Eq. 182.

(3) (1879) 40 L. T. 744.

(4) (1875) L. R. 7 H. L. 757.

(5) (1835) 1 Bing. N. C. 414; 41 R. R. 616.

(6) (1806) 2 B. & P. (N.R.) 170; 9 R. R. 632.

(7) (1886) 17 Q. B. D. 705.

(8) (1811) 13 East, 509; 12 R. R. 414.

(9) (1876) 1 C. P. D. 578.

(10) [1891] 2 Ch. 172.

(11) (1888) 21 Q. B. D. 535.

(12) [1900] 2 Q. B. 72.

(13) (1845) 14 M. & W. 403.

(14) (1854) 3 E. & B. 622.

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(1) (1873) L. R. 8 Q. B. 374.

(2) (1824) 3 B. & C. 45; 4 D. & R. 641; 27 R. R. 290.

(3) (1875) L. R. 10 Ex. 76, 337; (1876) 1 App. Cas. 476.

The terms of the bonds are inconsistent with their being negotiable instruments. The American bonds provide for the payment of the principal and interest in New York. The contracts, therefore, are governed by the law of New York; and they are not documents to which the custom of merchants can attach the incident of negotiability unless they are negotiable by the law of England and of the United States. The bonds cannot be regarded as English promissory notes, because the principal money is not payable unconditionally at a certain time.

Rufus Isaacs, K.C., and *Duke, K.C.* (*Ellis Hill* with them), for the defendants. When the bonds came to the defendants' hands, and they paid or gave credit for them, they became holders for value. The defendants were agents who had taken upon themselves the responsibility of delivering the bonds to third persons, namely, the jobbers to whom the bonds had been sold. Megson was under an obligation to deliver the bonds to the defendants to enable them to complete the sale, and the value given by the defendants was the extinguishment of their right to demand the bonds from Megson: *London and County Banking Co.* v. *London and River Plate Bank.* (1) When a contract is entered into by a broker with a jobber on the Stock Exchange, the broker becomes personally liable to the jobber, and the broker is entitled to call upon his principal to put him in a position to complete the transaction with the jobber by delivering the securities sold; but so long as the broker is a member of the Stock Exchange the jobber has no right to demand the securities from the broker's principal. It is incorrect, therefore, to say that in this case the defendants' position was that of agents merely, for superadded to the contract of agency was the contract between the defendants and the jobber for the performance of which the defendants were personally liable.

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(1) 3 B. & C. 45; 4 D. & R. 641; 27 R. R. 290.

(2) L. R. 8 Q. B. 374.

(3) [1898] 2 Q. B. 658.

(4) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

(5) (1887) 20 Q. B. D. 232.

(6) (1790) 1 H. Bl. 357; 1 R. R. 425.

(7) (1884) 10 App. Cas. 74.

(8) [1895] 2 Q. B. 598.

(9) (1856) 3 Macq. 1.

(10) (1877) 2 Q. B. D. 194.

(11) (1890) 15 App. Cas. 267.

(12) [1896] 1 Q. B. 211.

As to the question of negotiability, the argument that modern mercantile usage cannot attach to mercantile documents the incident of negotiability was exhaustively dealt with by Cockburn C.J. in the Exchequer Chamber in *Goodwin* v. *Robarts.* (2) The judgment of that Court and of the House of Lords in the same case entirely disposes of the argument for the plaintiffs, at any rate so far as relates to the bonds of foreign companies. The principle is that evidence is admissible to prove that in England a foreign bond passes by delivery as a negotiable instrument with all the incidents of negotiability. If the bonds were not negotiable instruments, the provision for registration which enables a holder to prevent them from being negotiable would not be required. The question as to the bonds of an English company was decided by Kennedy J. in *Bechuanaland Exploration Co.* v. *London*

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(1) 20 Q. B. D. 232.

(2) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

Trading Bank. (1) He rightly held that there is no distinction with respect to negotiability between the bonds of a foreign and of an English company. The English bond in this case purports on its face to be negotiable, and evidence is not required to prove that by usage it passes by delivery, because in effect it becomes negotiable by virtue of the estoppel resulting from the representation which it contains. That is the real ground of the decision of the House of Lords in *Goodwin* v. *Robarts.* (2)

Danckwerts, K.C., replied.

Cur. adv. vult.

May 9. BIGHAM J. read the following judgment:—This was an action in trover to recover the value of certain bearer bonds alleged to have been converted by the defendants to their own use. The bonds in question were those of the De Beers Consolidated Mines, Limited, the Denver and Rio Grande Railroad Company, the Mexican National Railroad Company, and the Union Pacific Railroad Company. All these were bonds of foreign corporations. There were also some bonds of the Bechuanaland Railway Company, which is an English company registered under the Companies Acts. The bonds are in the ordinary form of such securities. [The learned judge stated the facts as set out above, and proceeded as follows:—]

Neither the thief nor Megson was worth suing, and probably the plaintiff doubted whether he could make out a cause of action against the jobbers; but, whatever the reason, he selected the London brokers as the persons whom he would sue, and I have to determine whether they are liable. A body of evidence was called at the trial to shew that all these bonds pass from hand to hand among the people who deal in them, and that they are treated as negotiable in the same way as the bonds of foreign Governments. No serious attempt was made to refute this evidence, and it quite satisfied me that all the bonds in question belong to a class which bankers, stockbrokers, and others whose business it is to deal in such securities treat, rightly or wrongly, as negotiable and as passing

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(1) [1898] 2 Q. B. 658.

(2) 1 App. Cas. 476.

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& Co.

Bigham J.

from hand to hand by mere delivery. It is in these circumstances that the plaintiff seeks to fix the defendants with liability. He says that, though such bonds may in fact be treated commercially as negotiable, they are not in law negotiable; and he further says that even if lawfully negotiable, yet, as the defendants were never holders of them for value, they are liable in trover, having handled them with the intention of vesting the property and possession in the jobbers who bought them.

In support of the first of these two contentions Mr. Danckwerts argued that the attribute of negotiability could not be attached to a contract except by the law merchant; and that these bonds are of such recent creation that their negotiability under that branch of the law cannot be justified. It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that, in determining whether a usage has become so well established as to be binding on the Courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Cockburn C.J. in *Goodwin* v. *Robarts* (1), capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade; our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence. Thus it has been found convenient to treat securities like those in question in this action as negotiable, and the Courts of law, recognising the wisdom of the usage, have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression "bearer bond" connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities. It would be a great misfortune if it were otherwise, for it is well known that such bonds are treated in all foreign markets as deliverable from hand to hand; the attribute not only enhances their value by making them easy of transfer, but it qualifies them to serve as a kind of international currency; and it would be very odd and a great injury to our trade if these advantages were not accorded to them in this country. But I am not to be guided alone by evidence and by questions of expediency. The point is entirely covered by authority. The arguments in support of the contention that these bonds are not negotiable were all adduced before, and carefully examined by, Kennedy J. in the case of *Bechuanaland Exploration Co.* v. *London Trading Bank* (1), and were dismissed by him as unsound. I have read the judgment in that case, and desire to say that I entirely agree with the conclusions and with the reasons which lead up to them. I go, perhaps, further than Kennedy J. intended to go, for I think that it is no longer necessary to tender evidence in support of the fact

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(1) L. R. 10 Ex. at p. 346.

(1) [1898] 2 Q. B. 658.

that such bonds are negotiable, and that the Courts of law ought to take judicial notice of it.

The negotiability of the bonds being established, it is clear that the jobbers who bought them, having given value and having acquired them without any notice of infirmity in the vendor's title, could not be sued in trover by the plaintiff. But can the defendants, the brokers who assisted in perfecting the good title acquired by the jobbers, be sued? It is said they can. A broker who merely negotiates the sale of chattels without the authority of the true owner commits no tort at all. The sale is a mere void act. It divests the true owner of no right and it does not physically interfere with his control or possession of the goods. But if in addition to negotiating a sale the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorized sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner. It is argued that the defendants by what they did in handing the bonds to the jobbers have brought themselves within this rule of law. But, in my opinion, before the defendants had possession of the bonds at all or physically dealt with them in any way, they had become entitled to them for a valuable consideration just as effectually as the jobbers subsequently became entitled to them by paying the purchase price. When in the ordinary course of business the defendants negotiated the sale of the bonds to the jobbers they came under a personal liability to the jobbers to deliver them. This liability they undertook at the request of Megson, who was acting for the thief, and in consideration of their undertaking the liability Megson or the thief promised that he would deliver to them the bonds; these circumstances, in my view, made the defendants holders for value, and, as the bonds were negotiable, gave them power to deal with the bonds. Or it may be put in another way. Megson in the ordinary course of business would look to the defendants (so long as they were solvent), and not to the jobbers, for the price of the bonds; it is the defendants whom he would treat as the buyers, and to whom he would look, and, in fact, did look, for his money; this is the way in which the transactions would be carried through, and although this course of business does not make the defendants the buyers of the bonds, it makes them, in my opinion, holders for value as soon as they get possession of them and hand over the money in exchange for them. I think for these reasons that the defendants became as much holders of the bonds for value as the jobbers, and that they are entitled to the same protection.

But, even if they were not holders for value, I doubt whether they could be sued in trover, or sued at all. There appears to me to be an essential difference between meddling with goods with the intention of transferring a title which will be bad as against the true owner and the case of assisting in perfecting a title which will be good as against the true owner. It would be very odd that an action should lie against the broker for assisting the jobber to get his title when no action lies against the jobber who gets the title; and to so hold would go far to destroy the advantages of the negotiability of the bonds. It is not, however, necessary for me to decide this point. It is sufficient for me to say that, in my opinion, these bonds were negotiable instruments, and that the defendants were holders of them for value.

Judgment for defendants.

Solicitors for plaintiff: *Warren, Murton & Miller, for Mossman, Atkinson & Blankley, Bradford.*

Solicitors for defendants: *Gush, Phillips, Walters & Williams.*

F. O. R.

1902
April 8.

MASKELYNE & COOKE *v.* SMITH.

Fraudulent Conveyance — Deed of Arrangement with Creditors — Delaying Creditors—Registration—Contents of Affidavit—13 *Eliz. c.* 5—*Deeds of Arrangement Act*, 1887 (50 *&* 51 *Vict. c.* 57), *s.* 6, *sub-s.* 1.

A deed of arrangement with creditors, which is intended to give effect to a bonâ fide scheme of arrangement, is not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserves a benefit to the debtor, nor because some of the creditors are intentionally excluded from its operation.

The registration of a deed of arrangement is not void because the affidavit of the debtor required by s. 6, sub-s. 1, of the Deeds of Arrangement Act, 1887, does not contain the names of all the creditors.

Appeal of the claimant in interpleader proceedings from a decision of the deputy judge of the Westminster County Court. The facts were in substance as follows.

Early in 1900 the defendant Smith, who lived at Windsor, gave the plaintiffs a guarantee signed by himself and two others to secure the payment of their fees in respect of an entertainment given on behalf of the funds of a hospital on February 14, 1900. On May 11, 1900, the defendant executed a deed of arrangement with his creditors, under which the appellant Palmer was trustee. The deed purported to be made between the debtor of the first part, the trustee of the second part, and "the several persons, companies, and partnership firms (being creditors of the debtor) whose names and seals are affixed to the schedule hereto, or who shall otherwise in writing assent to these presents." The deed, after reciting that it had been agreed by the parties thereto of the third part to accept an offer by or on behalf of the debtor for payment to the creditors of a composition of 20*s*. in the pound on the amount and in full discharge of their debts to be paid by monthly instalments of 10*l*. to the trustee, and that the composition should be secured by the assignment of the debtor's estate to the trustee, contained a covenant by the debtor to pay the 10*l*. monthly, and on demand to pay certain costs and expenses to the trustee, the sums received from the debtor to be divided every three months among the creditors entitled thereto pro ratâ. The debtor as beneficial owner then conveyed and assigned to the trustee all his real and personal estate (except leaseholds and the necessary wearing apparel of himself and family) upon trust until default by the debtor in payment of the instalments to allow him to use and deal with the estate for the purposes of his business or such other purposes as the trustee might think proper, but subject to the control and supervision of the trustee, and after default by the debtor on trust to sell and realize and apply the net proceeds, after payment of costs and expenses, to the immediate payment to the creditors of so much of the composition as then remained unpaid, and to pay the surplus (if any) to the debtor, and to assign or deliver to him the remainder of the trust estate. There was a proviso that the trustee should not be bound to interfere with the debtor in the conduct of the business, or in his dealing with the estate further than he should think necessary, but the debtor was to conform to the trustee's suggestions or advice, and there was power to the trustee at any time to wind up the business and realize and divide the estates. The deed contained a release of the debtor by the creditors.

On the same day (May 11, 1900) the affidavit required by s. 6, sub-s. 1, of the Deeds of Arrangement Act, 1887, was sworn by the defendant, the schedule containing a list of twenty-four creditors. The names of Maskelyne & Cooke, the plaintiffs, did not appear in the schedule. The deed was executed on May 11 by the defendant and the trustee, and the signatures and assents of a large majority of the creditors were then or subsequently obtained. On May 17, 1900, the deed was duly registered under the Act.

In April, 1901, the plaintiffs sued the defendant upon his guarantee in the Mayor's Court for 12*l.* 12*s.*, the amount of their fees, and upon May 29 they recovered judgment for that amount and costs. Execution having been levied upon the defendant's goods, the goods seized were claimed by Palmer as trustee under the deed; an interpleader summons was taken out by the sheriff, and the interpleader proceedings transferred to the Westminster County Court. At the hearing the learned deputy county court judge found as fact that there was no collusion between the defendant and Palmer to defraud or delay creditors by means of the deed; that the defendant's motives were honest, but that the defendant, not considering the plaintiffs to be business creditors, by omitting their names from the schedule deliberately treated them as not being on the same footing as his other creditors, and that he intended to exclude them from the benefit of the deed; he therefore held the deed to be fraudulent and void under the statute of Elizabeth. He further found that the deed was void under s. 5 of the Deeds of Arrangement Act, 1887, by reason of the omission from the affidavit verifying the list of creditors required under s. 6, sub-s. 1, of the names of the plaintiffs. He therefore gave judgment in favour of the plaintiffs, the execution creditors. The trustee appealed. (1)

Herbert Reed, K.C. (*Pritchett* with him), for the claimant. The county court judge was wrong in law in holding the deed void under 13 Eliz. c. 5, for a deed may legally be made in favour of one or more of a man's creditors to the exclusion of others: *Alton* v. *Harrison.* (2) The deed was not a voluntary deed; it was assented to by the creditors whose assents were proved at the trial, and any creditor might at any time have come in under the deed and taken the benefit of it. There was no evidence upon which the county court judge could find the debtor's conduct to be legally fraudulent. The omission to insert the names of the plaintiffs as creditors in the affidavit did not avoid the registration and make the deed invalid; a deed of arrangement may itself be legally executed by some of the creditors after registration: *In re Batten, Ex parte Milne* (1); and the present is an a fortiori case. It would be a mere trap for creditors if a deed of arrangement could be avoided because of the omission of a single creditor from the affidavit after the other creditors have acted upon the deed, and have given time to the debtor and postponed their legal rights. Besides, at the time of registration the plaintiffs could not have been included, for no demand had then been made by them upon the defendant under his guarantee, and the debt was merely contingent. [He also cited *Wood* v. *Dixie*. (2)]

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(1) By 50 & 51 Vict. c. 57 (The Deeds of Arrangement Act, 1887), s. 5, a deed of arrangement is void unless registered under the Act within seven days after its first execution by the debtor or any creditor. By s. 6, sub-s. 1, the registration of a deed of arrangement is to be effected by filing with the registrar within seven clear days after execution "a true copy of the deed and of every schedule or inventory thereto annexed or therein referred to . . . . together with . . . . an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors."

(2) (1869) L. R. 4 Ch. 622.

Macaskie, K.C. (*Thorn Drury* with him), for the plaintiffs. The deed was void under 13 Eliz. c. 5, not because of any intention on the part of the debtor to exclude the plaintiffs from its operation, but because of the benefits reserved to the debtor, by reason of which it tended to defeat or delay creditors. Until default by the debtor in paying to the trustee the monthly instalment of 10*l*., the trustee was to allow the debtor to deal with and dispose of the estate for business purposes, subject only to his control; this might obviously defeat or delay creditors, whether parties to the deed or not. This deed is, in fact, more mischievous than the deed which was held void for this reason in *Spencer* v. *Slater*. (3) Secondly, the deed is vitiated by reason of the non-insertion of the plaintiffs as creditors in the affidavit. "Creditors" means all the creditors; this is clearly the view of Lord Esher M.R. in *In re Batten, Ex parte Milne*. (4) The word must at any rate mean all the unsecured creditors. [He also cited *Chaplin* v. *Daly*. (5)]

Herbert Reed, K.C., in reply. *Spencer* v. *Slater* (3) depended on the special provisions of a very unusual deed, which created a resulting trust in favour of the debtor; it was distinguished in *Boldero* v. *London and Westminster Discount Co.* (6), and is not a decision of general application.

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(1) (1889) 22 Q. B. D. 685.

(2) (1845) 7 Q. B. 892.

(3) (1878) 4 Q. B. D. 13.

(4) 22 Q. B. D. at p. 694.

(5) (1894) 71 L. T. 569.

(6) (1879) 5 Ex. D. 47.

1902

MASKELYNE & COOKE v. SMITH.

LORD ALVERSTONE C.J. This case is not wholly free from difficulty. It is an appeal from the decision of a county court judge in favour of the execution creditors upon the ground that a deed of arrangement made in May, 1900, was not binding against the execution creditors. The first ground upon which the county court judge based his decision was that the debtor had not included, and had not intended to include, the names of the plaintiffs, who for the purposes of this case were creditors, though not trade creditors, in May, 1900. All the facts are not before us, but it is clear that the judge held that the debtor's intention to exclude the names of the plaintiffs made the deed void. In my opinion that view is not correct, and is contrary to the principle of the decision in *Alton* v. *Harrison* (1). The other ground upon which the county court judge held the deed to be void was because the affidavit, which was made under the Act of 1887, omitted the names of the execution creditors. It was contended that the registration of the deed was void because it was not accompanied by an affidavit containing the names of all the creditors; but I think that this argument goes too far. There is nothing in the statute which makes the registration bad if there has been an honest omission of the name of a particular creditor. The language of Lord Esher M.R. and Fry L.J. in *In re Batten* (2) shews that the statute does not of necessity mean that every creditor must be included. If, as was suggested in the course of the argument, a deed of arrangement is made by two persons carrying on business in partnership, the deed can hardly be void because the affidavit contains only the names of the joint creditors of the partnership and not those of the separate creditors of the partners. I think, therefore, that both the grounds upon which the decision of the county court judge was based were wrong, and that, so far as those reasons go, his judgment should be reversed.

But another point has been taken on behalf of the execution creditors, which is in effect this: that the deed was void as tending to delay creditors, because it reserved a benefit to Smith, the maker of the deed. In support of this contention the case of *Spencer* v. *Slater* (1) was cited, where the Court came to the conclusion that a curiously framed deed, which prevented and was intended to prevent judgment creditors from levying execution, was void, as reserving a benefit to the debtor. That case lays down no general principle, and it is clear that in the subsequent case of *Boldero* v. *London and Westminster Discount Co.* (2) it was not regarded as having done so. Another reason for not treating *Spencer* v. *Slater* (1) as an authority governing other cases is that the previous decision of *Alton* v. *Harrison* (3) was not cited during the argument nor in the judgments, and it is very difficult to reconcile those two cases if *Spencer* v. *Slater* (1) is to be treated as a decision that every deed of arrangement which reserves any benefit to the debtor is void. The real question for us is, I think, the same as that stated in *Alton* v. *Harrison* (4): "If the deed is bonâ fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." We have been pressed by the counsel for the claimants with the argument that, if *Spencer* v. *Slater* (1) is to be treated as laying down the principle contended for, then every deed of composition which allows the debtor to carry on his business, or provides for an allowance being made to him, or which provides for any possible resulting benefit to him, is necessarily void. This point was not taken before the county court judge, but we are now asked to hold the deed to be bad upon its face. I am not prepared to so hold, having regard to the principle laid down in *Alton* v. *Harrison* (3) and recognised in *Boldero* v. *London and Westminster Discount Co.* (2); if this deed is to be set aside on that ground, there must be further facts before us. We must assume that the deed was made bonâ fide, as the county court judge has found to be the fact, and we cannot set it aside as being generally fraudulent; we can only do so upon some special ground. I think that this deed was not void upon either of the grounds upon which the county court judge decided, and there is not enough in the evidence to enable us to give effect to the further contention on behalf of the respondents.

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(1) L. R. 4 Ch. 622.

(2) 22 Q. B. D. 685.

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(1) 4 Q. B. D. 13.

(2) 5 Ex. D. 47.

(3) L. R. 4 Ch. 622.

(4) L. R. 4 Ch. 622, at p. 626.

DARLING J. I am of the same opinion. I will only add that I am unable to reconcile the cases of *Spencer* v. *Slater* (1) and *Alton* v. *Harrison* (2), which seem to differ in principle. The former case was laboriously distinguished in *Boldero* v. *London and Westminster Discount Co.* (3), but I think that as an authority it must for the future be regarded as apocryphal.

CHANNELL J. I agree, and have nothing to add as regards the particular case which we are deciding. In *Spencer* v. *Slater* (1) things were said in the judgment which are not to be regarded as authoritative, and which would not have been said if *Alton* v. *Harrison* (2) had been brought to the attention of the Court; but there are other matters in that case which may make the actual decision right. Our judgment proceeds on the ground that there is not enough in the deed to shew that it is void under the statute of Elizabeth.

Appeal allowed. Leave to appeal.

Solicitors for claimant: *Wood & Sons.*
Solicitors for execution creditors: *Seal & Edgelow.*

(1) 4 Q. B. D. 13.

(2) L. R. 4 Ch. 622.

(3) 5 Ex. D. 47.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1902
May 29.

MORRIS *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation—County Court—Order for Payment by Insurers in respect of Employer's Liability—Appeal to High Court—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 5—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

An appeal lies to the King's Bench Division against an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897.

Appeal against the order of a Divisional Court, reversing the order of a county court judge as after mentioned.

The appellant, Morris, was a workman who had obtained an award of a weekly sum by way of compensation against his employers, a limited company, under the Workmen's Compensation Act, 1897. That company having gone into liquidation, the appellant applied for and obtained from the county court judge an order, which directed payment by the respondents, the Northern Employers' Mutual Indemnity Company, under s. 5 of the Workmen's Compensation Act, 1897, of the weekly amount awarded, as being due to the employers from the respondents, as insurers in respect of the employers' liability to the appellant. The respondents appealed to the Divisional Court against the order of the county court judge on the ground that no sum was due from them to the employers as insurance money. The Divisional Court, following the decision in *Kniveton* v. *Northern Employers' Mutual Indemnity Co.* (1), reversed the order of the county court judge on that ground.

Ruegg, K.C., and *Chester Jones*, for the appellant. No appeal lay from the order of the county court judge to the High Court. No appeal is given by the Workmen's

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(1) [1902] 1 K. B. 880.

Compensation Act, 1897, against an order made under s. 5 of that Act; and, inasmuch as an appeal is expressly given to the Court of Appeal in respect of other matters by clause 4 of the 2nd schedule to the Act, the inference is that no appeal was intended to lie against an order under s. 5. The term "matter," as used in s. 120 of the County Courts Act, 1888, would no doubt be large enough to cover a proceeding under s. 5 of the Workmen's Compensation Act, 1897; but it is contended that, the proper inference from the terms of that Act being as suggested, that section is inapplicable.

[They then proceeded to contend that the decision of the Divisional Court was wrong on the merits.]

Haldane, K.C., and *F. E. Smith*, for the respondents, were not called upon to argue.

Collins M.R. We held in the case of *Leech* v. *Life and Health Assurance Association* (1) that an appeal did not lie to this Court against an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897, on the ground that such an appeal is not with regard to a matter incidental to the special jurisdiction of the county court judge under Sched. II. of the Workmen's Compensation Act, or which comes within the jurisdiction to entertain an appeal from the county court judge given to this Court by that Act; but we left open in that case the question whether an appeal would lie to a Divisional Court against such an order. That question now arises for decision in the present case. We have here a decision given by a county court judge in the exercise of his jurisdiction as such with regard to what would certainly appear at first sight to be a "matter" within the meaning of s. 120 of the County Courts Act, 1888. Primâ facie the Divisional Court would seem to have jurisdiction under that section to entertain an appeal with regard to any matter with which a county court judge has dealt in the exercise of his jurisdiction. It seems to me, therefore, that such jurisdiction must exist with regard to an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897, unless there is

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(1) [1901] 1 K. B. 707.

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something in that Act to negative its existence. I do not think that the appellant's counsel succeeded in pointing out anything in the Workmen's Compensation Act, 1897, which has that effect. The matters which arise under s. 5 may be matters of considerable importance, and primâ facie one would suppose that the Legislature intended that there should be an appeal from the county court in respect of them as in respect of other similar matters. For these reasons I think the Divisional Court had jurisdiction to entertain the appeal. [The Master of the Rolls then proceeded to deal with the merits, and held that the appeal must be dismissed.]

MATHEW L.J. and COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Chester & Co., for Fielding & Fernihough, Bolton.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for Peace & Allen, Wigan.*

E. L.

C. A.

1902

May 29.

[IN THE COURT OF APPEAL.]

KENNY *v.* HARRISON AND ANOTHER.

Employer and Workman—Workmen's Compensation—Factory—Dock, Wharf, or Quay—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

An accident happened in October, 1900, to a workman, while engaged in removing timber from a stack upon a piece of land, which was within the ambit of a system of docks belonging to a railway company, and which had been let by the company to timber merchants for the storage of timber. This piece of land was about forty yards from the water of a dock. Between it and the water ran the lines of a dock railway or tramway, but it was not separated from the adjoining wharf or quay space by any fence or other such physical barrier. Timber had sometimes been landed from the before-mentioned dock and brought to the said piece of land, but during the year 1900 all the timber stacked thereon had been landed from other docks forming part of the dock system more or less remote, and brought to the said piece of land by rail. On a claim by the workman for compensation under the Workmen's Compensation Act, 1897, the county court judge found as a fact that the place where the accident happened was a factory as being a dock, wharf, or quay within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

On appeal to the Court of Appeal:—

Held, that there was evidence to support his finding, and therefore the Court were bound by it.

Haddock v. *Humphrey*, [1900] 1 Q. B. 609, distinguished.

APPEAL from a decision of the judge of the Durham County Court upon an application for compensation by a workman under the Workmen's Compensation Act, 1897.

The appellants, Messrs. Harrison & Singleton, were timber merchants, to whom the North Eastern Railway Company, who were the owners of the docks at Hartlepool and land adjacent thereto, had leased a piece of land forming part of their dock premises upon the condition that it should be used only as a timber yard. The respondent, a labourer employed by a stevedore, who had contracted with the appellants for the removal of certain timber stacked upon the before-mentioned piece of land, was on October 11, 1900, while engaged in the work of removing the timber, injured through a piece of

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timber falling on his leg, and claimed compensation from the appellants under s. 4 of the Workmen's Compensation Act, 1897.

The facts as they appeared upon the county court judge's notes were, so far as material, in substance as follows. The North Eastern Railway Company were the owners of an extensive system of docks on the shore of Hartlepool Bay, at the two extremities of which respectively were situated the towns of Hartlepool and West Hartlepool. At each of these towns there was a railway station belonging to the railway company, from which a line of railway ran northward, the two lines converging till they met at a point about a mile from the bay. The land between each station and the water's edge belonged to the railway company, and lying round the bay between the two stations in the form of a crescent were the docks, which extended back from the bay about two-thirds of the way to the junction of the railway lines. These lines formed the boundary of the docks for some distance at either end of the bay, and between the points at which they ceased so to bound them the boundary was completed by an external fence running from line to line. The docks covered a space of about 400 acres, of which 200 acres were covered with water, forming coal, timber, and other docks, basins, and timber ponds, ramifying into every part of the company's dock premises. The greater portion of the dry area was used for the stacking and storage of timber. Between and around all the basins and penetrating every portion of the dock premises, was a complete network of rails or tram lines for the convenience of transport, which were in connection direct or indirect with the goods line which joined the main line of the North Eastern Railway about 500 yards north of West Hartlepool Station. When timber was taxed, the docks were bonding docks for timber, and, until the duty was paid, the stocks of timber had to remain at the expense of the timber merchants on plots of land set apart in the docks for that purpose. Since the removal of the duty merchants had been allowed from time to time to keep their stocks of timber in the docks on payment to the railway company of a consideration for the occupation of the ground. The piece of land let to the appellants as a timber yard as before mentioned, and upon which the accident to the respondent happened, was one of several pieces of land in the docks let to timber merchants by the railway company for the stacking of timber. Its area exceeded 12,000 square yards. It was situated at a distance of about forty yards from the water of a timber dock forming part of the dock system. It was not separated by any fence or other such physical barrier from the rest of the adjoining quay or wharf space, although there were alley posts marking off the limits for stacking timber. Between the piece of land so let to the appellants and the water of the before-mentioned dock ran the lines of an unfenced dock railway or tramway; and between those lines and the piece of land let to the appellants, and between that piece of land and other pieces of land let as timber yards to other timber merchants, were passages or gangways used for the purpose of access, but which did not appear to be made roads or subject to any right of user by the general public. It appeared that timber belonging to the appellants had been sometimes unloaded from the before-mentioned dock and brought thence across the lines to the piece of land let to the appellants; but during the year 1900 all the timber stacked thereon had been landed from docks forming part of the Hartlepool dock system more or less remote from the said piece of land, and had been brought thereto by rail. The county court judge held that the piece of land occupied by the appellants, on which the respondent was employed when the accident happened, was a "factory" within the definition given by the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, in respect of which the appellants were the undertakers, and that, as the stacking and removal of timber was part of the business of the appellants as timber merchants, they were liable to make compensation to the respondent under s. 4 of the Workmen's Compensation Act, 1897.

Ruegg, K.C., and *E. Shortt*, for the appellants. There was no evidence for the county court judge that the place at which the accident happened was part of a dock, wharf, or quay. It

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was let to the appellants as a timber yard for the storage of timber; and was not, at the time of the accident, in fact used for the landing and storing of timber from the contiguous dock. It was, as then used, no more a part of the dock, or of a wharf or quay, than would be a timber yard in the town two miles from the docks used by a timber merchant for the storage of timber coming from the docks. It is not sufficient that the place was capable of being used as part of a dock, wharf, or quay, if it was not in fact so used.

[MATHEW L.J. If this piece of land had continued in the occupation of the railway company, and had been used by them as it was used by the appellants, could it have been said that there was not evidence that it was part of the docks or wharves in connection with them? Then, can it make any difference that, instead of the railway company being the occupiers, and charging in their dock charges for the storage of the timber, they let the land to the merchants for that purpose?]

If the railway company resumed possession of the land, and used it for the purpose of unloading and loading goods from and to the dock, no doubt it would become again part of the dock premises; but it is submitted that the mere fact that, from its geographical contiguity to the dock and other circumstances, it was capable of being used for the purposes of the dock is not evidence that it was, as used at the time of the accident, part of the dock or wharf. The case is really undistinguishable from *Haddock* v. *Humphrey*. (1)

[They also cited *Raine* v. *Jobson & Co.* (2)]

Simey, for the respondent, was not called upon.

COLLINS M.R. This is an appeal against the decision of a county court judge, who has held that a workman was entitled to compensation on the ground that, at the time when he met with an accident, he was employed in a "factory" within the meaning of the Workmen's Compensation Act, 1897, in respect of which the appellants were the undertakers. The county court judge appears to have arrived at that conclusion on the ground that the place in question was a "dock, wharf, or quay"

(1) [1900] 1 Q. B. 609.

(2) [1901] A. C. 404.

to which the elaborate system of legislation contained in the Factory Acts applied. He has not specifically stated under which of those terms he considered the place to come, but it is sufficient if it comes within any one of them. We are bound by his decision on a question of fact. The only way in which the appellants can get rid of his finding is by shewing that it involved a misdirection because there was no evidence to support it. It is not ad rem to say that the finding was on the balance of the evidence a wrong one, and that the judge ought upon the evidence to have come to a different conclusion of fact. If there was any evidence upon which the judge could come to the conclusion that the place in question was capable of being described as a dock, wharf, or quay, his finding cannot be impeached. The facts have been exhaustively discussed. In the result it appears that the place in question was only separated by an interval of about forty yards from the water side of a wharf or quay within the ambit of what is conceded on all hands to have formed docks. It was at the time used for the purpose of timber being stocked there; but, having regard to its physical contiguity to a dock and other circumstances, it was possible to use it as a wharf in the strictest sense of the term; and it appears to me to be sufficiently near to the water to be regarded as forming part of a quay. It seems to me, therefore, that there was evidence on which it was possible to find, and on which the county court judge was justified in finding as a fact, that the place where the respondent was employed was part of a dock, wharf, or quay. It is quite immaterial whether one would have drawn the same conclusion of fact oneself. Where a place is by its physical situation and other circumstances such as to be in its nature a dock, wharf, or quay, it appears to me to be no answer to say, as the appellants do in this case, that, at the particular time when the accident occurred, it was being temporarily used for a purpose not strictly that of a dock, wharf, or quay. It does not alter the character of the place upon which the timber was deposited, if it was for the time being used in a way which might render it difficult to use it for the purposes which it was by its nature designed to serve, namely, those of a dock, wharf, or quay. That point seems really to be dealt with by what Lord Halsbury L.C. said in the case of *Raine* v. *Jobson & Co.* (1), in which it was held that a dock did not cease to be a dock for the purposes of the Workmen's Compensation Act, 1897, because it was hired from the dock company for the purpose of repairing a ship. The whole basis of the argument for the appellants in the present case seems to be that, in the circumstances which existed at the time of the accident, the place in question was not being used after the manner of a dock, wharf, or quay. I do not think that signifies if it was in its nature a dock, wharf, or quay. It was urged that to decide in favour of the respondent in this case would be inconsistent with the decision in *Haddock* v. *Humphrey* (2); but it is to be observed that in that case the county court judge had come to the conclusion, as a matter of fact, that the place there in question was not a wharf. The contention for the appellant in that case was that it was a wharf. It was not, and could not under the circumstances be, suggested that it was a dock or quay. The place there was 150 yards from the water's edge, and separated from the wharf or quay by a fence. The question was one of fact, and it is obvious that there was ample evidence in that case to justify the county court judge in the conclusion at which he arrived upon facts which were very different from those in the case with which we are dealing. For these reasons I think the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. I think there was evidence to support the finding of the county court judge; for the evidence given by the appellants' foreman, and the representative of the railway company, shewed that sometimes timber belonging to the appellants was discharged from the adjacent dock upon the piece of land let to them. The circumstances are explained under which the piece of land let to the appellants, together with other pieces of land, was originally used as part of the dock premises for the purpose of the discharge of timber coming to the docks. Formerly a duty was levied on timber, and these pieces of land within the

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(1) [1901] A. C. 404.

(2) [1900] 1 Q. B. 609.

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dock premises were used for keeping the timber in bond at the merchant's expense until the duty was paid. Afterwards, when the duty was abolished, the timber merchants were allowed to occupy the same pieces of land for the storage of timber on payment of rent for their use. In my opinion these plots were originally, when occupied by the railway company, and used for storage purposes, as I have mentioned, part of the docks. It is contended that the fact that they are now leased to the timber merchants, for purposes similar to those for which the railway company formerly used them, so alters their character that they no longer form part of the docks. I cannot assent to that view. The mere fact that in the somewhat similar case of *Haddock* v. *Humphrey* (1) this Court held that there was some evidence to support the finding of a county court judge, to the effect that the place there in question was not a wharf, does not establish any principle of law by which we are prevented from deciding that there was in this case evidence to support the finding of the county court judge.

COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for appellants: *Bell, Brodrick & Gray, for Harrison & Barker, Hartlepool.*

Solicitors for respondent: *J. E. & H. Scott, for J. R. Fryer, West Hartlepool.*

(1) [1900] 1 Q. B. 609.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
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June 6.

MARSHALL *v.* RUDEFORTH.

Employer and Workman—Workmen's Compensation—"Scaffolding"—Ladder —Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman was injured through an accident while employed on a house exceeding thirty feet in height, which was being repaired by means of a ladder. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the ladder was not "a scaffolding" within the meaning of the 1st sub-section of the 7th section of the Act:—

Held, that, it being impossible to say, as a matter of law, that the ladder must be "a scaffolding" within the meaning of the Act, the Court was bound by the finding of the county court judge.

Appeal against a decision of the judge of the Scarborough County Court upon a claim by a workman against his employer for compensation under the Workmen's Compensation Act, 1897.

The respondent, the employer, had contracted to execute certain repairs to the roof of a house exceeding thirty feet in height. The appellant, a workman employed by the respondent in the work, while carrying slates up a ladder placed against the house, one end of which rested on the ground, and the other on the parapet of the house, fell from the ladder, and sustained the injuries in respect of which compensation was claimed. The case was tried on admissions, of which the following only were material, namely, that the house exceeded thirty feet in height, that it was being repaired by means of a ladder, and that the workman, while working on or using the ladder, fell from it a distance of over thirty feet. The county court judge held that the ladder was not "a scaffolding" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 1, and therefore refused to award compensation.

Longstaffe, for the appellant. It was held in *Hoddinott* v. *Newton, Chambers & Co.* (1) that the word "scaffolding" as

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(1) [1901] A. C. 49.

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used in the Workmen's Compensation Act, 1897, is not confined to a "scaffolding" in the ordinary sense of the term, but includes any structure or contrivance, which serves the purpose of a scaffolding, as, for instance, a plank resting upon pieces of wood lashed to pillars, or a plank resting on two walls. An arrangement like a ladder consisting of wooden steps or supports attached to uprights, if constructed for the occasion, could hardly be said not to be a scaffolding consistently with the expressions used by the learned Law Lords in *Hoddinott* v. *Newton, Chambers & Co.* (1) It cannot make any essential difference that such a structure is not put together for each occasion, but kept ready made as a permanent contrivance. [He also cited *Wood* v. *Walsh* (2); *Maude* v. *Brook* (3); *Veazey* v. *Chattle.* (4)]

Ruegg, K.C., for the respondent, was not called upon to argue.

COLLINS M.R. The county court judge has held in this case that the appellant was not entitled to compensation. The facts were ascertained by means of admissions, of which the following only are material. It was admitted that the house was over thirty feet in height, that it was being repaired by means of a ladder, that the appellant was working on or using the ladder, and that he fell from it a distance of over thirty feet. The ladder appears to have rested on the ground, and to have been over thirty feet in height. The judge found as a fact on these admissions that the ladder was not "a scaffolding" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 1. Unless we can say, as a matter of law, that a ladder used under the conditions which existed in this case must be a scaffolding, we cannot reverse his decision. Having regard to the different decisions which have been given on this subject, I must confess myself unable now to frame any definition of "a scaffolding" within the meaning of the Act in terms which must necessarily exclude a ladder. But that is an altogether different thing from saying that, as a matter of law, a ladder must necessarily be a scaffolding.

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(1) [1901] A. C. 49.

(2) [1899] 1 Q. B. 1009.

(3) [1900] 1 Q. B. 575.

(4) [1902] 1 K. B. 494.

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Unless we can come to the conclusion that the county court judge misdirected himself in arriving at the finding that the ladder in this case was not a scaffolding, we have no power to interfere. For these reasons I think that the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. A ladder may form part of an arrangement which, according to the decisions, might be treated as a scaffolding for the purposes of the Workmen's Compensation Act, 1897, but I cannot see my way to the conclusion that, as a matter of law, a ladder must necessarily be included in the term "scaffolding."

COZENS-HARDY L.J. I agree. I cannot see how this Court can hold that, in point of law, a ladder must be a "scaffolding."

Appeal dismissed.

Solicitors for appellant: *Iliffe, Henley & Sweet, for Tasker Hart, Scarborough.*

Solicitors for respondent: *Radford & Frankland, for John Whitfield, Scarborough.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1902
June 6.

ARMITAGE *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Employer and Workman—Workmen's Compensation—Accident arising out of and in the course of the Employment—Tortious Act of Fellow-Workman—Act having no relation to the Employment—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

Where an accident happened to a workman, while engaged at his work, through the tortious act of a fellow-workman which had no relation whatever to their employment:—

Held, that the accident did not arise out of the employment within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 1.

Appeal from a decision of the judge of the Manchester County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The respondent was a boy about sixteen years of age, who had been employed by the appellants, the railway company, in the coach-painting department of their carriage works. A number of boys were so employed by the appellants, over whom there were three foremen. On the occasion in question, while the respondent and the other boys were engaged at the works, one of the boys named Smith pushed another boy named Harrop into a pit, which there was on the works, for a "lark." Harrop, becoming angry, picked up a piece of iron, which was in the pit, and threw it at Smith. It missed Smith, and hit the respondent on the eye, causing him injuries in respect of which he claimed compensation from the appellants.

The county court judge held that the accident to the respondent was one which arose out of and in the course of his employment, and accordingly awarded him compensation.

C. A. Russell, K.C., and *Spencer Hogg*, for the appellants. The accident to the respondent arose entirely from the act of Harrop. That act had no relation whatever to the work on which the boys were employed, and the doing of it could not be said in any sense to be within the scope of or incidental to the employment of either of the boys. It is not as if the accident had been caused by some act which, though not authorized, or contrary to instructions, might be deemed to be within the general scope of a fellow-workman's employment, or might be supposed to be done by him in intended furtherance of his employer's interests. The act of Harrop was a purely tortious act, done on his own account, and entirely outside the scope of his employment. The case really stands on the same footing in principle as if some person not engaged in the same employment, who had a grudge against a workman, trespassed on the premises and inflicted an injury on him while at work, or threw a missile from outside at him. An accident arising from such an act cannot be said to arise out of the employment.

[They cited *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co.* (1)]

A. Powell, K.C., and *McCleary*, for the respondent. An accident may fairly be said to arise out of and in the course of the employment, if it arises in the course of the employment from some risk ordinarily incidental to such an employment. Where a number of young boys are employed together at works like these, it is, according to common experience, an ordinary incident of their employment that they will, when the foreman's back is turned, engage in "larking." It is submitted that, if two boys in the same employment get "larking" over their work, and injury is accidentally thereby occasioned to a third, who is engaged upon his work, the accident may be said to arise out of and in the course of the employment. Such an accident as this is one of the risks incidental to the employment of boys in a factory. Suppose a workman carelessly threw down a heavy tool, and thereby injured a fellow-workman: surely that would be an accident arising out of the employment; because it is common experience that such carelessness is incidental to the employment. So also, in the case of boys employed in a factory, it is naturally incidental to the employment that they should in the course of their work sometimes indulge in "larks" and do acts of mischief. The question whether the act done by Harrop was within the scope of his employment is not the proper test. That is the proper test, no doubt, where a person injured by the act of a servant is bringing an action against the master. The Workmen's Compensation Act, 1897, is expressly meant to give compensation in cases where at law the master would not otherwise be liable; and the question whether an accident arises out of and in the course of the employment is not to be determined by considering whether the act causing the accident to the workman was one for which the master was at law responsible. The case of an injury caused to a workman by a trespasser on the works, or by somebody, not a fellow-workman, throwing a missile from outside, is not analogous to the present case. Those risks cannot be said to be incidental to the employment.

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(1) (1901) 3 F. 564.

C. A. Russell, K.C., in reply, cited *Smith* v. *Lancashire and Yorkshire Railway.* (1)

Collins M.R. In this case the county court judge has held that the respondent was entitled to compensation under the Workmen's Compensation Act, 1897. The question is whether he has not arrived at that conclusion by misdirecting himself in point of law. The findings of the judge on questions of fact, if there is evidence to support them, and he has not misdirected himself, are final; but the question arises here whether an accident, happening as this accident undoubtedly happened, can in point of law be said to be an accident arising out of and in the course of the employment within the meaning of the Workmen's Compensation Act, 1897. I do not think that it can. The accident in this case, no doubt, happened while the respondent was engaged in his employment, through the act of some one who was engaged in the same employment, but that act was one which had no relation whatever to the employment.

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(1) [1899] 1 Q. B. 141.

A boy, engaged in the same work as the respondent, in anger threw a piece of iron at another boy, which missed him, and hit the respondent. This was a wrongful act entirely outside the scope of the employment. The statute does not provide an insurance for the workman against every accident happening to him, while he is engaged in the employment of his master, but only against accidents arising out of and in the course of that employment. The argument put forward by the appellants' counsel may not furnish an exhaustive test as to what is or is not an accident arising out of and in the course of the employment; but I think it is at any rate a useful guide in dealing with that question to see whether the act which caused the accident was or was not entirely outside the scope of the employment of the person who committed it. We have to consider what sort of accident the Legislature contemplated, when they spoke of accidents arising out of and in the course of the employment. Did they intend to give compensation to the workman for injuries occasioned to him, while engaged in his employment, by an accident arising from any act which might be done by another workman engaged in the same employment, although it might have no relation whatever to that employment? I think that it is obvious that they did not so intend. The fact that a boy in the same employment as the respondent, having a grudge against another boy, threw something at him, which missed him and hit the respondent, cannot in my opinion be described as an accident arising out of the employment; the accident did not arise from anything which by any stretch of language can properly be said to be incidental to the employment of either of the boys. It was as entirely outside the scope of the employment of the one to do the act which caused the injury, as it was outside the scope of the employment of the other to be exposed to such an injury. It is not necessary to discuss the various illustrations which have been suggested during the argument. A similar point to that arising in this case was discussed in Scotland in the case of *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co.* (1), and, though the judges there differed somewhat as to the view which ought to be taken of the facts in that case, the dissentient judge does not seem to me, having regard to what he says at the end of his judgment, to have arrived at a conclusion inconsistent with the view which I have expressed in this case, namely, that, as a matter of law, it cannot be said that an accident caused to a workman while engaged in his work by a fellow-workman's doing a wrongful act entirely outside the scope of his employment is an accident arising out of and in the course of the employment. For these reasons I think the appeal must be allowed.

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(1) 3 F. 564.

MATHEW L.J. I am of the same opinion. The Act gives compensation in respect of accidents "arising out of and in the course of the employment." If the words had been merely "arising in the course of the employment," possibly the result might have been different, but we have to deal with the additional words "out of," which we must suppose to have been introduced by the Legislature for some reason. Can it be said in the present case that the accident arose out of the employment? I think not. It arose from an act which was entirely outside the scope of the employment, both of the boy who inflicted the injury and the boy who sustained it. It was suggested that we ought to read the words "arising out of" as equivalent to "incidental to" the employment. I am not satisfied that, if we did so read them, the construction of the Act would be in any way more favourable to the respondent's contention. But the words suggested are not the words of the Act, by which alone we must be governed. Possibly the accident in this case, it might be argued, had arisen in the course of the employment, but that is not enough. Another condition has to be fulfilled. The accident must have arisen out of the employment. I do not think that in the present case it can be said to have so arisen.

COZENS-HARDY L.J. I agree. I think that the contention for the respondent really involves the erasure of the words "out of" from the section. That contention in effect was that, the accident having occurred in the course of the employment, it is immaterial how it happened, with the exception, possibly, that it must be caused by the act of somebody employed on the premises, and not that of a trespasser from outside. I cannot assent to this contention. I think that some meaning must be given to the words "out of" in the section. They appear to point to accidents arising from such causes as the negligence of fellow-workmen in the course of the employment, or some natural cause incidental to the character of a business. An accident arising out of the dangerous nature of a business carried on, and not involving any human agency, such, for instance, as spontaneous combustion of some material, might be said to arise out of the employment. But I do not think that an accident caused by the tortious act of a fellow-workman having no relation whatever to the employment can be said to arise out of the employment.

Appeal allowed.

Solicitors for appellants: *Woodcock, Ryland & Parker, for C. Moorhouse, Manchester.*

Solicitors for respondent: *Chester, Broome & Griffithes, for Chapman & Brooks, Manchester.*

E. L.

C. A.
1902
June 10.

[IN THE COURT OF APPEAL.]

McIVER & CO., LIMITED *v.* TATE STEAMERS, LIMITED.

Practice—Costs—Examination of Witness before Trial—Attendance of Country Solicitor — Taxation — Costs as between Party and Party — Rules of the Supreme Court, January, 1902, *r.* 10. *Order* LXV., *r.* 27, *reg.* 29. *Appendix N, No.* 147.

Rule 10 of the Rules of the Supreme Court, January, 1902, applies to taxation of costs both as between party and party and as between solicitor and client.

In an action upon a charterparty a witness, whose evidence was essential to the plaintiffs' case, was examined in London before the trial of the action. The plaintiffs' solicitor from Liverpool attended at the examination for the purpose of instructing counsel. The plaintiffs having succeeded in the action, upon the taxation of costs between party and party the taxing master allowed in respect of the solicitor's attendance as aforesaid an amount exceeding two guineas, the maximum allowance for such an attendance specified in Appendix N to Order LXV., No. 147.

Held, that the taxing master had power to make the allowance which he made in the exercise of the discretion given to him by rule 10 of the Rules of the Supreme Court, January, 1902.

APPEAL by the defendants from an order of Bigham J. refusing to direct a review of taxation.

The action arose out of a time charter of a steamer, the plaintiffs being the charterers and the defendants the shipowners. By the terms of the charterparty the charterers were to pay for the coal used by the ship, and the claim of the plaintiffs was for damages for negligence by the defendants in allowing the ship to start upon a voyage under the charter insufficiently provided with coal, the result being that the ship was obliged to deviate from her voyage, and call at a port for coal, by reason whereof the voyage was delayed and a higher price had to be paid by the plaintiffs for the necessary coal.

An order was made for the examination of a witness for the plaintiffs, who had been employed by them as supercargo on the ship, in London before the trial, and the witness was examined accordingly. The evidence so taken was essential to the plaintiffs' case at the trial with reference to the quantity of coal with which the ship started on the voyage, and as negativing a suggestion on the defendants' part that the deviation had been necessitated by exceptionally stormy weather. The plaintiffs' solicitor from Liverpool attended on the examination of the witness in London for the purpose of instructing counsel. The plaintiffs recovered judgment in the action with costs. On taxation of the costs as between party and party, the taxing master allowed twelve guineas for the costs of the attendance of the solicitor from Liverpool. This item was objected to on behalf of the defendants on the ground that the master had no discretion to allow any larger amount of costs in respect of the attendance than the maximum specified by Appendix N to Order LXV., No. 147, namely, two guineas. The master held that he had a discretion to make the allowance which he had made under rule 10 of the Rules of the Supreme Court, January, 1902, the evidence of the witness being very important to the plaintiffs' case. The judge on appeal affirmed his decision. (1)

Bailhache, for the defendants. The taxing master has no discretion to allow, as between party and party, any further costs in respect of a solicitor's attendance at the examination of a witness than the amounts specified in Appendix N, Nos. 146–148. The object of the new rule 10 of the Rules of the Supreme Court, January, 1902, which annulled the old regulation 29 of Order LXV., r. 27, with regard to party and party costs, was only to make the taxation of costs between

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(1) By rule 10 of the Rules of the Supreme Court, January, 1902, "Regulation 29 of Order LXV., r. 27, is hereby annulled, and the following regulation is substituted therefor: On every taxation the taxing master shall allow all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses."

C. A.
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party and party approximate more nearly to that between solicitor and client, and so to give the successful party something like an indemnity against the costs which he has to pay, except where costs have been incurred through overcaution, negligence, or mistake; but it was not intended to give to the master in taxations as between party and party a discretion to go beyond the scale. There were certain items in Appendix N which under the old regulations it was the practice not to allow on taxation as between party and party, but to allow only as between solicitor and client; and the intention with which rule 10 was framed was to give the master a discretion as to such items on taxation as between party and party; but it was never meant by that rule to abrogate the scale, or to give the master a discretion to depart from it in cases within the rule. The provisions of the scale are imperative except in certain cases where a special discretion is expressly given to the taxing master, which is not the case as to items 146–148. As between solicitor and client, the only allowances that could be made in respect of attendance on the preliminary examination of a witness were those mentioned in Appendix N, Nos. 146–148, and such an allowance as was here made for the attendance of the country solicitor could not therefore be made, except in cases where the incurring of the expense had been sanctioned by the express instructions of the client, or had been subsequently ratified by him. If rule 10, which is applicable only to party and party taxations, has the effect contended for by the plaintiffs, the extraordinary result will be produced that in those taxations the master will not be bound by the scale, but will have a discretion to make an allowance which he would not have in the case of a taxation as between solicitor and client.

[Mathew L.J. Rule 10 in terms applies to "every taxation."]

It appears to have been framed merely in substitution for the old regulation 29 of Order lxv., r. 27, as to party and party taxation. It is submitted that all that the new rule was intended to effect was the assimilation of the practice on taxation as between party and party to that which had previously existed on taxation as between solicitor and client. If the rule is construed as applying to taxation as between solicitor and client as well as to that as between party and party, and the suggested general discretion is given to the taxing master, practically the scale is gone. [He cited *In re Harrison*. (1)]

A. D. Bateson, for the plaintiffs, was not called upon to argue.

Mathew L.J. The learned judge held that the question whether these costs should be allowed was within the discretion of the master. The argument for the defendants, both before the judge and before us, was that the master had no discretion to allow them. Assuming that the master had a discretion in the matter, I see no reason to doubt that under the circumstances of the case these costs in respect of the attendance of the solicitor from Liverpool might properly be allowed. Having regard to the nature of the matters as to which the witness was to be examined, it would appear to be a reasonable course that the local solicitor, who was familiar with the facts and the questions involved, should attend the examination. But it is argued that under the Rules the master had no discretion to allow these costs. According to the practice as to taxation of costs between party and party prior to the Rules of January, 1902, the scale given in Appendix N was no doubt binding on the master, and this allowance could not have been made. But, on consideration of the objections to this rule, it was thought desirable to modify it to some extent, and accordingly the new rule 10 of the Rules of the Supreme Court, January, 1902, was made, by which it is provided that "regulation 29 of Order LXV., r. 27, is hereby annulled and the following regulation is substituted therefor: On every taxation the taxing master shall allow all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party; but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses." We are asked to construe this rule as meaning that the taxing master shall allow no costs, charges, or expenses beyond those provided for by the scale given in Appendix N. The new regulation was framed with full knowledge of the terms of the old regulations and of the scale, and it cannot, I think, be doubted that it ought to be construed according to its terms, namely, as giving the master on "every taxation" discretion to allow such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, subject to the exceptions mentioned in the latter part of the rule. In this case there appears to be no reason for suggesting that the allowance made was not perfectly reasonable, and it comes within the plain terms of the rule. For these reasons I think the appeal must be dismissed.

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(1) (1886) 33 Ch. D. 52.

Cozens-Hardy L.J. The argument of the defendants' counsel appears to amount to this, namely, that rule 10 of the new Order of January, 1902, was simply intended to bring the taxation of costs as between party and party more nearly up to the standard then existing with regard to the taxation of costs as between solicitor and client; or, in other words, that the discretion of the master under that rule was intended to be bounded by the limits which under Appendix N were then applicable as between solicitor and client. On the best consideration which I can give to the matter, I do not think that argument ought to prevail. Rule 10 substitutes the regulation therein contained for regulation 29 of Order LXV., r. 27. The terms of that regulation were in some respects similar to those of rule 10, but it was in terms limited to taxation as between party and party, whereas it appears clear from the terms of the present rule that it extends to "every taxation," whether between party and party or between solicitor and client. On so reading the rule, the conclusion derivable from its terms with regard to a case like the present appears to be, not that, in all cases where the country solicitor comes up to town to attend an examination of a witness, his expenses are to be allowed, but that the master in each case is to consider all the circumstances; and, if he thinks an expense was necessary or proper for the attainment of justice, or for defending the rights of a party, and that it has not been incurred through over-caution, negligence, or mistake, he may allow the same either as between party and party or as between solicitor and client, even although in the latter case there was no previous instruction from the client to incur it, or subsequent ratification of it by him. The solicitor is left free to exercise his own discretion with regard to the matter, subject to the jurisdiction of the master to decide on taxation whether it was proper to incur the expense or not. If this was a matter within the discretion of the taxing master, it is not for us to say whether he rightly exercised that discretion or not, but I agree with my Lord that in this case his discretion appears to have been well exercised.

Appeal dismissed.

Solicitors for plaintiffs: *Charles Russell & Co., for C. A. M. Lightbound & Co., Liverpool.*

Solicitors for defendants: *Downing, Bolam & Co., for Bolam & Co., Sunderland.*

E. L.

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June 10, 11.

[IN THE COURT OF APPEAL.]

HUGHES *v.* PUMP HOUSE HOTEL COMPANY, LIMITED.

Assignment of Debt or Chose in Action—Absolute Assignment (not purporting to be by way of Charge only)—Security for Debt—Instrument passing whole Right of Assignor—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A contractor for certain building works executed an instrument in writing, by which, in consideration of bankers' continuing a banking account with him, and by way of continuing security to them for all moneys due or to become due to them from him on the said account, he assigned to them all moneys due, or to become due, to him from the building owners under the building contract, and he thereby empowered them on his behalf, and in his name, to settle and adjust all accounts in connection with the works, to give effectual receipts for the moneys thereby assigned, which should discharge the person paying the same from being concerned to see to the application thereof, and also, if necessary, to sue for, or take such other steps as they might think necessary for enforcing payment of the moneys thereby assigned, and he further thereby undertook at their request and his own cost to do and execute all such further acts, deeds, and things as they might reasonably require for giving full effect to the security thereby created. Notice in writing of this assignment was given to the building owners:—

Held, that, the above-mentioned instrument having the effect of passing the whole right and interest of the assignor in the moneys payable under the building contract to the assignees by way of security, it was an absolute assignment (not purporting to be by way of charge only) within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6.

Mercantile Bank of London v. *Evans*, [1899] 2 Q. B. 613, distinguished.

Appeal of defendants from the judgment of Wright J. on the argument of a preliminary point of law directed to be raised before trial of the action under Order xxxiv., r. 2.

The action was by a builder to recover 2788*l.*, being the total of amounts alleged to be due to him from the defendants, an hotel company, as the balance of the contract price of work done under a contract entered into on November 1, 1899, between the plaintiff and the defendants for the completion by the plaintiff of a pump room and the execution of alterations and additions to the defendants' hotel at Llandrindod Wells, and for extra work done in connection with the contract.

The plaintiff on March 7, 1901, signed and gave to Lloyd's Bank, Limited, the following instrument: "In consideration of your continuing a banking account with me the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Company, Limited, of Llandrindod Wells, under or by virtue of a certain contract dated November 1, 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump room and for making certain alterations and additions to the Pump House Hotel, Llandrindod Wells), and all other moneys, if any, due, or to become due, to me from the said company, including all moneys due, or to become due, for extras in connection with the works contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recovering the moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your request and my cost to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created."

On the same day notice in writing by the bank of the assignment to them contained in the above-mentioned instrument, and an authority or request signed by the plaintiff for payment to the bank of all moneys payable to the plaintiff under the contract, were given to the defendants. An order had been

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made for the determination of the preliminary point of law whether the assignment of March 7, 1901, was an absolute assignment within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6, of the subject-matter of the plaintiff's claim, and therefore the plaintiff's claim had passed to the bank. The learned judge held that the before-mentioned assignment was not an absolute assignment within the meaning of s. 25, sub-s. 6, but was by way of charge only, and he therefore decided that the action might proceed.

S. T. Evans, K.C., and *R. E. L. Vaughan Williams*, for the defendants. The instrument here in question is an absolute assignment within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873. It purports to be such an assignment in terms, and does not purport to be by way of charge only. It is quite clear from the cases that an assignment, which purports to be absolute, is none the less an absolute assignment within the section because it is by way of security and there is an equity of redemption.

[They cited *Brice* v. *Bannister* (1); *Comfort* v. *Betts* (2); *Durham Brothers* v. *Robertson* (3); *Mercantile Bank of London* v. *Evans* (4); *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (5); *Jones* v. *Humphreys*. (6)]

Lewis M. Richards, for the plaintiff. The mere fact that the word "assign" is used in the instrument is not conclusive, if on the purview of the whole instrument it can be gathered that a charge only was intended. Here the assignment is to be a floating security for the amount due on the plaintiff's banking account from time to time. That amount might vary very much; a very small sum or even nothing might be due upon the account. It could hardly be intended in such a case that there should be an absolute assignment to the bank of the whole of the plaintiff's rights and interest in the moneys payable under the contract. The provision empowering the bank to sue for the moneys due on the contract would be super-

(1) (1878) 3 Q. B. D. 569.
(2) [1891] 1 Q. B. 737.
(3) [1898] 1 Q. B. 765.
(4) [1899] 2 Q. B. 613.
(5) (1889) 23 Q. B. D. 239.
(6) [1902] 1 K. B. 10.

fluous if the assignment were absolute. The provision for further assurance also points to the conclusion that the assignment was not meant to be absolute. It is submitted that this case comes exactly within the principle of the decisions in *Mercantile Bank of London* v. *Evans* (1) and *Jones* v. *Humphreys* (2); for the true construction of the document is that it is only meant to be an assignment of so much of the moneys payable under the contract as may cover the amount due on the plaintiff's banking account from time to time.

S. T. Evans, K.C., in reply. The ground of the decision in *Mercantile Bank of London* v. *Evans* (1) was that, on the construction of the particular instrument there in question, the Court came to the conclusion that the assignment of the chose in action was only to such extent as was necessary to cover 200*l.*, and therefore was not an absolute assignment. That would not apply to the present case. The ground of the decision in *Jones* v. *Humphreys* (2) was that there was no assignment of the entirety of a debt, or even of any ascertained part of a debt. Here the whole amount due is assigned.

Cur. adv. vult.

June 11. MATHEW L.J. In this case the learned judge has decided that the assignment was not absolute within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873, and that it purported to be by way of charge only, and, therefore, that the action was properly brought in the name of the assignor. The defendants appeal from his decision, and contend that the instrument in question constituted an absolute assignment within the meaning of the section, and therefore the action in the name of the assignor ought not to be continued. In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a

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(1) [1899] 2 Q. B. 613.

(2) [1902] 1 K. B. 10.

Mathew L.J.

whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s. 25, and the action must be brought in the name of the assignee. The circumstances under which this litigation arose were as follows. The plaintiff had contracted with the defendants to execute extensive building works. That contract was entered into in November, 1899. On March 7, 1901, the assignment in question was made by the plaintiff to Lloyd's Bank. When the work was completed, a dispute arose between the plaintiff and the defendants as to the balance payable in respect of the price of the work and for extras, and in respect of that balance the action was brought by the plaintiff. The objection was thereupon taken by the defendants that, having regard to the terms of the assignment of March 7, 1901, the action could not be maintained in the name of the assignor. The instrument of March 7, 1901, was in these terms: [The Lord Justice here read the instrument.] On the same day on which the assignment was executed notice of it was given to the defendants, and an authority was sent to them by the plaintiff requesting them to pay to the bank all sums payable under the contract. What, then, is the effect of the assignment? It seems to me clear from its terms that the intention was to pass to the assignees complete control of all moneys payable under the building contract, and to put them for all purposes in the position of the assignor with regard to those moneys. That being so, I think, unless there be some difficulty created by the decisions on the subject, this instrument may be properly described as an absolute assignment, because it is one under which all the rights of the assignor in respect of the moneys payable under the building contract were intended to pass to the assignees, and not one which purports to be by way of charge only. The learned judge appears to have been of opinion that the assignment was not absolute, but purported to be by way of charge only, because the object was that it should be a continuing security for such amount as might from time to time be due from the assignor to the assignees. But, if that were the true criterion, it might equally well be argued that a mortgage is not an absolute assignment, because under a mortgage it may become necessary to take an account in order to ascertain how much is due; but, though a mortgage is only a security for the amount which may be due, it is nevertheless an absolute assignment because the whole right of the mortgagor in the estate passes to the mortgagee. The governing principle with regard to what constitutes an absolute assignment is indicated by the decisions in *Comfort* v. *Betts* (1) and *Durham Brothers* v. *Robertson.* (2) In the former case an assignment was made of certain debts to a trustee on trust for the benefit of the creditors. It was argued that this did not amount to an absolute assignment of the debts, but it was pointed out in answer that by the terms of the instrument creating the trust the whole interest of the assignors was intended to be conveyed to the assignee, and the subsequent creation of the trust did not derogate from the absolute character of that assignment. The principle laid down in both the cases which I have mentioned appear to be applicable to the present case. Certain authorities, on the other hand, were relied upon for the plaintiff. It is not necessary, I think, to go through all of them. Those principally relied upon were *Mercantile Bank of London* v. *Evans* (3) and *Jones* v. *Humphreys.* (4) In each of those cases general terms were used in making the assignment, but, when the whole instrument was looked at, it appeared that what was intended was only to assign so much of the debt or chose in action as would provide security for a debt, in the one case of 200*l.*, and in the other of 22*l.* 10*s.* Upon that becoming apparent, it was held that the true character of the interest given was that of a charge only. It is unnecessary to dwell upon the obvious distinction between those cases and the present. In the course of the argument the question was raised whether an assignment of part of a debt comes within s. 25 of the Judicature Act, 1873. We are not called upon to decide that question in this case, and I will express no opinion upon it further than to say that, as at present advised, I think, when that question arises for decision, much may be said in favour of the view that an assignment of part of a debt could not be an absolute assignment within the section.

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(1) [1891] 1 Q. B. 737.
(2) [1898] 1 Q. B. 765.
(3) [1899] 2 Q. B. 613.
(4) [1902] 1 K. B. 10.

COZENS-HARDY L.J. read the following judgment:—The question raised by this appeal is whether a document dated March 7, 1901, is an "absolute assignment (not purporting to be by way of charge only)" within the meaning of s. 25 of the Judicature Act, 1873. Now, it has been repeatedly held that the word "absolute" does not mean absolute by way of sale, and that the assignment may be "absolute" though by way of mortgage: see *Burlinson* v. *Hall* (1) and *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (2) These were decisions of Divisional Courts, but the Court of Appeal has adopted the same view. In *Durham Brothers* v. *Robertson* (3) the Court held that the particular document in question was not absolute but conditional. The judgment of Chitty L.J. is however very much in point. He said (4): "To bring a case within the sub-section transferring the legal right to sue for the debt, and empowering the assignee to give a good discharge for the debt, there must be (in the language of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that the assignment should be, or at all events purport to be, absolute, but it will not suffice, if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment. As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (2) there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National and Provincial Bank* v. *Harle* (5)) that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute: it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment. In a well-known judgment of the Exchequer Chamber in *Halliday* v. *Holgate* (1) the late Willes J., in delivering the judgment of the Court, distinguished between lien, pledge, and mortgage, and spoke of a mortgage as passing the property out and out. A mortgage is not mentioned in the enactment; but, where there is an absolute assignment of the debt, the limiting words as to a charge only are not sufficient to exclude a mortgage."

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(1) (1884) 12 Q. B. D. 347.
(2) 23 Q. B. D. 239.
(3) [1898] 1 Q. B. 765.
(4) [1898] 1 Q. B. 771.
(5) (1881) 6 Q. B. D. 626.

It was suggested to us in argument that this was in some way inconsistent with the subsequent case in this Court of *Mercantile Bank of London* v. *Evans*. (2) I cannot however adopt this contention. On the construction of the particular document before them, the Court held that there was not an assignment of the whole debt. The position of a mortgagee of a debt was not in any way challenged. I may observe that A. L. Smith L.J. was a party to the decision in *Burlinson* v. *Hall*. (3) If, on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot in my opinion be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum,

(1) (1868) L. R. 3 Ex. 299.

(2) [1899] 2 Q. B. 613.

(3) 12 Q. B. D. 347.

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or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee: nor does it matter that the assignee has obtained a power of attorney, and a covenant for further assurance from the assignor. Both these elements were found in *Burlinson* v. *Hall.* (1) The real question, and, in my opinion, the only question, is this: Does the instrument purport to be by way of charge only? It remains to apply these principles to the document of March 7, 1901. In my opinion that document is an absolute assignment, and does not purport to be by way of charge only. It assigns all moneys due or to become due under the contract. It follows that the plaintiff, Hughes, has no right of action, and that the order of Wright J. must be discharged.

Appeal allowed.

Solicitors for plaintiff: *Paterson, Snow, Bloxam & Kinder, for Hadley & Dain, Birmingham.*

Solicitors for defendants: *G. J. Vanderpump & Son, for Daniel Evans, Brecon.*

(1) 12 Q. B. D. 347.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1902
March 13.

HULTHEN *v.* STEWART & CO.

Ship — Charterparty — Demurrage — Discharge of Cargo—"As fast as the Steamer can deliver"—Conditions at Port of Discharge that delay Discharge — Receiver of Cargo doing all he could be reasonably expected to do — Liability for Delay — Strike Clause — Effect on Construction of Charterparty.

A charterparty contained a clause, "The cargo to be loaded and discharged with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports"; and also a clause, "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics, the time for loading or discharging shall not count during the continuance of such strike or lock-out or epidemic." The vessel arrived at the port of discharge, but from the crowded state of the dock to which she was ordered delay occurred in bringing her into it, and further delay in getting a berth when she was in the dock, and in unloading. At the trial of an action by the shipowner against the indorsees of a bill of lading, which incorporated the terms of the charterparty, for demurrage for detention of the ship, it was proved that the vessel could be discharged in five days if nothing came in the way of the discharge, that the time occupied in the discharge exceeded five days, and that the defendants did all that they reasonably could, under the circumstances, to discharge the cargo. Judgment was given for the defendants. On appeal:—

Held, that the expression "as fast as the steamer can deliver" did not import the same obligation as to the discharge of the cargo as if five days had been named, and that the defendants, having discharged the cargo within a time which was reasonable under the existing circumstances, were not liable for the delay:

Held, also, that the insertion of the strike clause in the charterparty did not affect the construction of the clause relating to the discharge of the vessel.

Appeal from a judgment of Phillimore J. at the trial of the action without a jury.

The action was brought by shipowners against indorsees of bills of lading, which incorporated the terms of a charterparty, to recover demurrage for the detention of the vessel at the port of discharge. The charterparty was the Chamber of Shipping White Sea Wood Charter, and had reference to the carriage of a cargo of timber from the White Sea to London. Clause 3 was as follows: "The cargo to be loaded and discharged with customary steamship despatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging, excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at thirty pounds per day, and pro ratâ for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." Clause 5 was as follows: "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics, the time for loading or discharging shall not count during the continuance of such strike or lock-out or epidemic (a strike or lock-out of the shippers' or receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter if by the use of reasonable diligence they could have obtained other suitable labour), and in case of any delay by reason of the before-mentioned causes no claim for damages shall be made by the shippers, the receivers of the cargo, the owners of the ship, or by any other party under the charterparty."

The vessel arrived at Gravesend, and her arrival was notified to the defendants, who ordered the captain to proceed to the Surrey Commercial Dock to discharge. He could not get into the dock immediately, and the result was that the vessel was detained at Gravesend for several days. She eventually entered the dock, and the learned judge who tried the cause decided that she was only an arrived ship when she reached the place at which she could discharge. No question was raised upon this point in the appeal. After the ship entered the dock there was a further delay, owing to the crowded state of the dock, before she could get to a wharf, and further delay in unloading. The learned judge found that, with clear ground on which to discharge, the work could have been completed in five or six days. He also found that about 98 per cent. of deal and batten cargoes are discharged in the Surrey Commercial Dock; that of the remaining 2 per cent. some small part is discharged into lighters at different tiers in the river, some in the Millwall Dock, a very small portion in the Regent's Canal Dock, and occasionally timber cargoes are discharged in the West India Dock; but that at the date when the vessel arrived at Gravesend there was no place at which she could have been ordered so as to be discharged without any delay. Millwall Dock was full, there was no tier at which the ship could safely discharge, and no lighters could have been obtained at the West India Dock. The learned judge held that it was not the true meaning of the charterparty that the ship was to discharge in the number of hours in which she could ordinarily discharge, and that the obligation on the defendants was to exercise all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could. He came to the conclusion that the defendants performed that duty, and that, with the appliances which were available at the time, the ship could not have discharged her cargo more quickly than she in fact did. Judgment was, therefore, given for the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C., and *Leck*, for the plaintiff. The difficulty in the way of unloading the cargo is no answer to the claim of the shipowner. The obligation on the charterers is to unload as fast as the steamer can deliver the cargo, and not as fast as the charterer can receive it. There are three classes of cases, one where the number of lay-days is named, as in *Thiis* v. *Byers* (1), another where the number of days is not named and a reasonable time is implied, as in *Postlethwaite* v. *Freeland* (2), and the third where a special bargain is made. This case falls within the first class, for the time, though not named, can be ascertained. If not within the first, it is within the last-mentioned class, for the bargain is to unload the cargo as fast as the ship is able to deliver it. The case is distinguishable from cases in which special appliances of the port of

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(1) (1876) 1 Q. B. D. 244.

(2) (1880) 5 App. Cas. 599.

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discharge must be used; and it is submitted that the principle applicable to cases in which the means of unloading are by special appliances in the exclusive control of some authority, and outside the control of the charterer, ought not to be applied in this case. This charterparty does not take into account hindrances to the receiver of the cargo arising from want of lighters or quay space, the only exception in favour of the receiver being that contained in the strike clause. The insertion of that clause shews that it was intended to exclude all other matters affecting the charterer that might delay the delivery.

[They cited *Pyman* v. *Dreyfus* (1); *Lyle Shipping Co.* v. *Cardiff Corporation* (2); *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (3); *Good* v. *Isaacs.* (4)]

Loehnis (*Robson, K.C.*, with him), for the defendants. No fixed number of days is named in the charterparty, and the charterers have no means of knowing in how many days the ship can discharge under the most favourable circumstances. Since 1880, starting with the case of *Postlethwaite* v. *Freeland* (5), decisions, on expressions equivalent to that used in this charterparty, shew that the state of things at the port of discharge must be looked at. If the receiver has done all that he reasonably can to procure the discharge, he is not liable for delay. The later decisions are *Rodenacker* v. *May* (6), before Mathew J.; *Wallenburgh* v. *Payne & Co.* (7), before Bigham J.; *Reid* v. *Lee* (8), before Kennedy J.; *The Jaederen* (9), before Barnes J. The insertion, or rather retention, in the charterparty of the strike clause cannot alter the interpretation of the preceding clause, which deals with the time for delivery of the cargo, or lead to an inference of an intention to alter a material part of the charterparty by excluding all other exceptions. The effect of the clause is that if there is a strike and delay occurs, there is to

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(1) (1889) 24 Q. B. D. 152.

(2) [1900] 2 Q. B. 638. In the quotation of the clause of the charterparty in the head-note to the report of this case the word "reasonable" should be struck out.

(3) [1891] 2 Q. B. 647.

(4) [1892] 2 Q. B. 555.

(5) 5 App. Cas. 599.

(6) (1901) 6 Com. Cas. 37.

(7) (1901) Unreported.

(8) (1901) 17 Times L. R. 771.

(9) [1892] P. 351.

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be no obligation on the charterer to shew that he has made all reasonable efforts to discharge the cargo. So that if there is a strike, it is agreed that the effect of the delay caused by it is to fall on the shipowner. In this particular case the clause may be surplusage; but it would not be so if a fixed number of days were named, and undue weight must not be put on the fact of its retention.

Leck, in reply. The exception is not confined to strikes, but includes epidemics, and excludes further limitations.

Collins M.R. This is a question of a claim by a shipowner for demurrage, and it turns on the construction of a clause in a charterparty in these terms: "The cargo to be loaded and discharged with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging, excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30*l*. per day, and pro ratâ for any part thereof." That is clause 3; and clause 5 is in these terms: "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics, the time for loading and discharging shall not count during the continuance of such strike, or lock-out or epidemic."

The vessel arrived in the port of London, and it is conceded that it must be assumed for the purpose of this argument that it had come up to the gate of the Surrey Commercial Docks. The state of business in the dock at the time was such that the ship could not get in at once, and when she ultimately got in there was delay in getting a berth, and further delay in unloading when she got a berth by reason of the congestion of business in the dock. It appears that she could have got a berth in the West India Dock; but in that dock there was a difficulty in getting lighters into which to unload, and the learned judge who tried this case has found that the vessel could not have been discharged in the West India Dock, owing to sufficient lighters being unattainable, more quickly than she was in fact discharged. There is a further finding that the charterers did all that they reasonably could to discharge the ship. These being the facts, the question of law is whether the charterers are liable. The point, therefore, comes to this —whether the clause that the ship is to be discharged "as fast as the steamer can deliver" is to be taken as importing an obligation to discharge in five days, which is the time the vessel would take in being discharged if nothing came in the way of the discharge. If the clause can be read as limiting the time for discharging to five days, it would follow that there was an unconditional obligation to discharge in that time; but I am of opinion that it cannot be so read.

There is a line of authorities from which it appears that words such as those in this charterparty do not import the same obligation as exists in cases where a fixed number of days is stipulated for. In *Hick* v. *Raymond* (1) it was held by the House of Lords that where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo his obligation is to discharge within a reasonable time, and that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances so long as he does not contribute to the delay. That case only followed *Postlethwaite* v. *Freeland* (2), where the words of a charterparty were "to be discharged with all despatch, according to the custom of the port." Those words were held not to be equivalent to a fixed number of days, and, therefore, evidence was admitted of circumstances which shewed that the charterer had done all that he reasonably could. It does not seem to me that the specific difficulties in the way of the charterers in these cases are material to the discussion before us. However the difficulties arose, the principle is that the Court is not precluded from considering them on the ground that the provision as to discharge is equivalent to naming the number of days for discharge. Once free of the idea that there is an absolute unconditional liability

(1) [1893] A. C. 22.

(2) 5 App. Cas. 599.

imposed by the provision of a fixed number of days, the liability is to be determined by another standard, which is whether, under the circumstances, the charterer had done all that he could reasonably be expected to do towards discharging the ship. It is, therefore, not material to this discussion to point out what were the particular facts which let in the element of reasonableness in those cases, and to shew that they were not the same facts as are present in this case.

With regard to the actual words of this charterparty, in *Postlethwaite* v. *Freeland* (1) the words were "with all despatch according to the custom of the port." "All despatch" does not mean anything less than all, and, therefore, it must mean the best despatch the steamer can give. The expression appears to me to be as strong as that used in the present case. In *Lyle Shipping Co.* v. *Cardiff Corporation* (2) the words were "with all despatch as customary." In *Wyllie* v. *Harrison* (3), which was a case in the Scottish Courts, the decision in which was approved in this Court in *Good* v. *Isaacs* (4), the words were "to be discharged as fast as steamer can deliver after having been berthed as customary." In the last-mentioned case the words were "to be discharged at usual fruit berth as fast as the steamer can deliver as customary, and where ordered by the charterers." The only way in which those cases were distinguished from the present during the argument was that the particular conditions upon which the Court held that in those cases what the charterers had done was reasonable were not precisely the same conditions as exist in this case. We have, however, the finding of the learned judge that under the conditions that existed in this case the charterers had done all that they reasonably could be expected to do, and there was clearly evidence that would justify this finding. We have, therefore, got to this point—there is authority that evidence of the circumstances under which the unloading took place can be let in where the undertaking is to use all despatch in unloading, and even in cases where the undertaking is to discharge as fast as the steamer can deliver. That seems to me to carry this

(1) 5 App. Cas. 599.

(2) [1900] 2 Q. B. 638.

(3) (1885) 13 R. 92.

(4) [1892] 2 Q. B. 555.

case through. On the facts that I have stated and the findings of the learned judge, it seems to me that the vessel was not detained to any degree of which the shipowner can complain, because it was impossible under the circumstances to get her sooner into the dock, or to unload her faster when she got into the dock.

It is a remarkable thing that this charterparty or others which contained the same clause have come under the consideration, not only of the learned judge who decided this case, but also of Gorell Barnes J., Bigham J., my brother Mathew L.J., and Kennedy J., all of whom took the same view with respect to it.

There was another point which I ought to touch upon, and that is that there is in this charterparty a strike clause. I agree that valeat quantum the argument for the appellant is sound that if the interpretation put on the charterparty by the learned judge is right the strike clause was unnecessary, because the charterer would be protected without it. We have, however, the decisions on this or similar charterparties to which I have referred, in some of which attention was specially drawn to the strike clause, the existence of which did not qualify or cut down the interpretation of the words defining the time. I think the explanation is that the words defining the time are clear in themselves, and that the fact that a clause is introduced dealing with the particular mischief which might arise from strikes cannot be used as throwing light upon what the parties intended to agree to in the clause which gave the measure for the time allotted for delivery.

In my opinion this appeal should be dismissed.

ROMER L.J. I am of the same opinion. On the question of the proper construction of clause 3 of this charterparty, the governing clause, in my opinion that clause cannot be distinguished from the corresponding clause in the charter which had to be considered in the case of the *Lyle Shipping Co.* v. *Cardiff Corporation.* (1) In that case the authorities were all cited and considered, as, indeed, they have been again to-day;

(1) [1900] 2 Q. B. 638.

and I can only say that, having heard the authorities cited and considered them again, I adhere to what I said in that case as to the settled result of the authorities upon such a clause as we had there, and as we have here.

That being so, this case on the question of construction is really governed by the decision of the *Lyle Shipping Co* v. *Cardiff Corporation* (1), subject only to a consideration as to what is the effect, in the case now before us, of the strike clause, namely, clause 5. No doubt clause 5, having regard to the construction which has to be put upon clause 3, is an unnecessary clause in this charterparty. That must be admitted. But it appears to me that it would be a wrong thing in this charterparty to say that we are bound to hold that clause 5 must be a necessary clause in this charterparty, in order thereby to give a different effect to what I regard as the settled construction which has been put by the Courts upon clause 3. Certainly such a process ought to be avoided in a charterparty. We all know how in charterparties clauses are frequently from time to time added or altered without much attention being paid to their precise effects upon other clauses which are not being immediately considered. To my mind it would be a very rash thing to say with regard to charterparties, on a question of construction, that it must be assumed that every clause found in a charterparty must be taken to be necessary, and that we are bound to start from that hypothesis and reason as to what is the effect on the other clauses of the charterparty—clauses having by law a well-known and significant meaning and effect. I think such a process would lead to most astonishing results; and I think that here we ought to say, what is the obvious fact, that this strike clause has in this particular charterparty, having regard to the special wording of clause 3, become an unnecessary clause.

That being the view the Court takes with regard to the question of construction, the appeal must fail; for upon the question of fact it appears to me impossible to differ from the decision of Phillimore J., who has come to the conclusion that in this case, having regard to the circumstances, the discharge of the cargo was effected with all reasonable despatch. That being so on the question of fact, the defendants here have satisfied the obligation cast upon them, and have shewn that there has been no unnecessary delay in the discharge for which they are responsible under the charterparty. I agree, therefore, in thinking that the appeal should be dismissed.

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(1) [1900] 2 Q. B. 638.

MATHEW L.J. I am of the same opinion. I should have thought that by this time the mercantile community would have been informed as to the view that lawyers take of this common clause in a charterparty, and if the result is unexpected by the shipowner in this case it should be known that in future it will be perfectly easy to avoid any discussion of the kind if the shipowner and charterer would only insert plain language in the charterparty. That plain language has not been adopted, and we are left once more, after many authorities, to construe this clause in the charterparty. "Cargo to be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." It is said that we have to consider what customary despatch means—that customary despatch, everything being available for the purpose, might mean a certain number of days, and therefore we must read into the charterparty "customary despatch"—that is to say, "despatch in so many days"—as the meaning of the parties. I am wholly unable to construe the clause in that way. What is said is "customary despatch according to the custom of the port." Now, the ship is to be taken as having arrived in this case at the dock gate—that is the fair effect of what was arranged at the time. What was customary despatch according to the custom of the port? Light is thrown upon that by the case of *Postlethwaite* v. *Freeland* (1), where the clause was practically the same—"All despatch according to the custom." Numerous cases have been referred to: *Good* v. *Isaacs* (2); *Lyle Steamship Co.* v. *Cardiff Corporation* (3); the cases before my brother Bigham, my brother Kennedy, and the case in the Probate Division before my brother Gorell Barnes; and in every one the same principle has been adopted. It was decided in *Hick* v. *Rodocanachi* (1) that these undertakings must be taken to refer to ordinary circumstances, and not to extraordinary circumstances beyond the control of the consignee, and we should be running athwart all those decisions if we were now to adopt the subtle arguments addressed to us on the part of the shipowner. This clause in this contract must receive from us the same interpretation which has been put upon it in the numerous cases mentioned.

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(1) 5 App. Cas. 599.
(2) [1892] 2 Q. B. 555.
(3) [1900] 2 Q. B. 638.

So much as to the interpretation of this clause. But then it was said, "You put into this charterparty a contract against a strike. With a strike no doubt there would have been an impossibility with regard to discharging the ship which the consignee could not get over, and because that clause is inserted in the contract the consignee is responsible for every other impossibility." A more unreasonable construction of such a document cannot well be.

These documents are not prepared by lawyers with reference to a rule of construction which often has seemed to me to lead to unreasonable results, and it is quite possible that this clause might have been introduced with reference to what is present to every mercantile mind, the possibility of a strike, without the least intention to deprive the merchant of the protection which is afforded to him under other circumstances of hindrance, as was held in the case of *Hick* v. *Rodocanachi*. (1) I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Stokes & Stokes.*
Solicitors for defendants: *Trinder, Capron & Co.*

A. M.

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(1) [1893] A. C. 22.

1902
May 29.

In re DRUCKER (No. 2).
Ex parte BASDEN.

Bankruptcy—Practice—Examination of Witness—Witness Abroad—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 27, 168—*Bankruptcy Rules*, 1886, *r.* 66.

The jurisdiction conferred on the Court by s. 27 of the Bankruptcy Act, 1883, to order that any person, who if in England would be liable to be brought before it under the section, shall be examined in Scotland or Ireland, "or in any other place out of England," must be read with some limitation, and does not extend to places abroad which are not within the jurisdiction of the British Crown.

Application by the trustee in bankruptcy for an order for the examination of the bankrupt and his brother under the following circumstances.

The bankrupt, who was a naturalized British subject, had absconded, and was known to be on the Continent. He had persistently absented himself from his public examination, and had declined to give the trustee any information respecting his property and affairs. He was believed to own considerable property in Holland. His mother, Madame Thérèse Drucker, was a foreigner residing on the Continent, and had lodged a proof for 10,000*l.* against his estate. On rejection of her proof by the trustee she filed affidavits in support thereof, but her attendance in England for cross-examination could not be obtained. On May 16, 1902, on an application made on her behalf, an order was made appointing a special examiner for the purpose of taking her examination and cross-examination at Zurich, in Switzerland; and it was ordered that the costs of the application and of the commission should be borne by her in the first instance, and the ultimate question of the costs was reserved. Thereupon the trustee applied, ex parte, to the registrar for an order under s. 27 of the Bankruptcy Act, for the examination of the bankrupt and of his brother before the person appointed to take the examination of Madame Thérèse Drucker under the order of May 16, and for production by these parties at such examination of certain documents alleged to be in their possession relating to the debtor's property.

There was evidence that the bankrupt and his brother would most probably be present at the examination of their mother under the commission appointed by the order of May 16, and that if they would tender themselves for examination they could give very valuable information to the trustee respecting the bankrupt's property in Holland, and the fortune which he was believed to have acquired under his father's will.

The registrar referred the matter to the judge.

Carrington, for the application. By s. 168 of the Bankruptcy Act, 1883, the word "property" is for the first time defined as property "in England or elsewhere," and it is submitted that s. 27 of the Act is for the purpose of giving full effect to this definition. Under s. 27 the bankrupt and his brother, if in England, would be liable to be summoned to give evidence. The examination need not be before the registrar, but can be taken "in any other place": Bankruptcy Rules, 1886, r. 66; *Re Bradbrook.* (1) It is submitted that under sub-s. 6 of s. 27 the Court has power to order the examination of these persons at Zurich, where it is believed they will be when Madame Drucker is examined. Alternatively, the trustee asks that a direction may be added to the order of May 16 authorizing the examiner to take their evidence should they be present and be willing to submit themselves for examination.

WRIGHT J. As at present advised, I am of opinion that under s. 27 I have no power to make the order asked for. Although the words "or in any other place out of England" in sub-s. 6 of that section are primâ facie wide enough to include a place not within the British dominions, yet I think they must be construed as limited to places within the jurisdiction of the British Crown. It seems to me that that restriction is primâ facie necessary. It is impossible to suppose that the Legislature intended to empower the Court to order the examination of persons in foreign countries; for instance, in

(1) (1889) 6 Morr. 188.

1902

DRUCKER (No. 2), *In re.* BASDEN, *Ex parte.*

Wright J.

France or Germany. If I made the order, I could not compel these persons to come up for examination, nor could I punish them if they refused to come, or came and would not answer. I regret I cannot make the order. Nor can I make it in the optional form that they should be examined, if they think fit to submit. I do not think that is within the function of the Court at all, or is the kind of thing the section intended.

Solicitors: *King, Wigg & Co.*

H. L. F.

1902

April 24.

THE KING *v.* MEAD AND ANOTHER.

Justices—Practice—Institution of Prosecution—Consent in Writing—Bread Act, 1822 (3 *Geo.* 4, *c. cvi.*), *s.* 16—*Sunday Observation Prosecution Act,* 1871 (34 *&* 35 *Vict. c.* 87), *s.* 1.

The provision of s. 1 of the Sunday Observation Prosecution Act, 1871, that no prosecution or other proceeding shall be instituted for any offence committed under 29 Car. 2, c. 7 (The Sunday Observance Act, 1677), except by or with the consent in writing of the chief officer of police of the district or with the consent in writing of two justices of the peace or a stipendiary magistrate, has no application to prosecutions under s. 16 of the Bread Act, 1822, for selling or exposing for sale bread on the Lord's Day.

RULE NISI calling upon a metropolitan police magistrate to shew cause why he should not state a case for the opinion of the Court.

A summons had been issued against one Werbitski, a baker, under 3 Geo. 4, c. cvi., s. 16, charging him with exercising his calling of a baker on Sunday by selling or exposing for sale bread on the Lord's Day. Upon the hearing of the summons objection was taken on the part of the defendant that the consent in writing of the chief officer of police of the district, or of two justices, or of a stipendiary magistrate was, under s. 1 of the Sunday Observation Prosecution Act, 1871 (34 & 35 Vict. c. 87), a condition precedent to the institution of the proceeding. The learned magistrate was of opinion that the provisions of the Act of 1871 had no application to prosecutions under 3 Geo. 4, c. cvi., and after hearing the evidence convicted the defendant.

An application to state a case was refused on the ground that it was frivolous. (1)

Arthur Powell, K.C. (*McBarnet* with him), for the prosecutor, shewed cause against the rule. No consent to the institution of the prosecution was necessary, for the Act of 1871 has no application to prosecutions under the Bread Act, 1822 (3 Geo. 4, c. cvi.). The offence charged is not an offence under 29 Car. 2, c. 7, but is an offence under the Act of 1822. The Act of 1871 is in terms confined to prosecutions under 29 Car. 2, c. 7, and imposes a restriction on the institution of prosecutions under that Act; it refers to no other Act either expressly or by implication. The object of s. 16 of the Bread Act, 1822, was not to secure the observance of Sunday, but to prevent bakers working seven days a week; that section would still remain of full force even if the Act of Charles II. were repealed.

Henriques, for the defendant, in support of the rule. The application for a case was clearly not frivolous, for if written consent is necessary its absence at the time of laying the information is fatal to the prosecution: *Thorpe* v. *Priestnall.* (2) Further, s. 16 of the Bread Act, 1822, is merely explanatory of 29 Car. 2, c. 7, and the offence is an offence under the Act of Charles II. The Act of 1871 does not deal with "prosecutions under" the Act of Charles II., but with "offences committed against" that Act; and this being such an offence is protected from prosecution unless consent is obtained under the Act of 1871. [He also referred to *Crepps* v. *Durden* (1); *Rex* v. *Younger* (2); Hawkins' Pleas of the Crown, ed. 1824, bk. 1, c. 6, s. 8.]

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(1) 3 Geo. 4, c. cvi., s. 16, prohibits a baker from baking bread, &c., on the Lord's Day, or selling or exposing it for sale, after a certain hour.

By 34 & 35 Vict. c. 87 (The Sunday Observation Prosecution Act, 1871), s. 1, "No prosecution or other proceeding shall be instituted against any person or the property of any person for any offence committed by him under 29 Car. 2, c. 7, intituled 'An Act for the better observation of the Lord's Day, commonly called Sunday,' or for the recovery of any forfeiture or penalty for any such offence, except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed, or with the consent in writing of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where such offence is committed."

(2) [1897] 1 Q. B. 159.

Lord Alverstone C.J. This is a rule to state a case upon a point which has been fully dealt with in the affidavit of the learned magistrate; if any other point were raised we should order a case to be stated; but as we are in a position upon the materials now before us to decide the question at issue between the parties, I think it right to do so at once. The contention made before us in support of the rule is that the provisions of the Sunday Observation Prosecution Act, 1871, apply to prosecutions under 3 Geo. 4, c. cvi. (which is the Bread Act applying to the metropolis), so as to make the consent required by the former Act a condition precedent to the institution of a prosecution under the latter. But upon consideration it seems reasonably clear that, however much we may wish or may think it desirable to impose limits on these prosecutions, the Act of 1871 has not done it. That Act in terms deals with the institution of prosecutions for offences committed under the Act of Charles II., and it makes no mention of any other statute. The statutes relating to bread form a code in themselves, and those relating to the metropolis run from 34 Geo. 3, c. 61, to 3 Geo. 4, c. cvi., the Act now in operation, and it is not difficult to see why they were passed. The Act of Charles II. was a general Act, which protected, or left out of its operation, works of necessity and charity; being a general Act, it became desirable that some protection should be given against, or limitation imposed upon, its operation, and this was eventually done by the Act of 1871. Now in 1793, in the case of *Rex* v. *Younger* (2), the question was raised whether the business of a baker came within the description of necessity, and this seems to have led to the passing of 34 & 35 Geo. 3, c. 61, and subsequent Acts dealing with various matters arising in the exercise of the calling of a baker. It seems therefore that, with regard to the baking of bread in the metropolis, a special code has been enacted by the Legislature with special provisions as to the time when, and the circumstances under which, a prosecution may be instituted, the ingredients of the offence, and the exceptions which may be allowed from the general provisions. Looking to this scheme of legislation, it seems to me to be going too far to say that the Act of 1871, which in terms refers only to the Act of Charles II. and makes no mention of any of the long series of Bread Acts, has brought them within its purview by implication because it speaks of offences committed under the Act of Charles II. The circumstances which amount to an offence under the Bread Act may, in certain cases, amount also to an offence under the Act of Charles II.; but it is obvious that some things which might be offences under the later Act would not be offences under the earlier one, and this may be the explanation why the Bread Acts are not referred to by name in the Act of 1871. In order that there should be a bar to the institution of proceedings in respect of a matter which is primâ facie within the operation of a statute, it must be clear, either necessarily or by implication, from the language used that a limitation is imposed. In my opinion the objection taken to these proceedings fails, and the summonses were rightly entertained by the magistrate, although no consent had been obtained under the Act of 1871 to the institution of the proceedings.

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(1) (1777) Cowp. 640.

(2) (1793) 5 T. R. 449; 2 R. R. 638.

DARLING and CHANNELL JJ. concurred.

Rule discharged.

Solicitors for prosecutor: *Pattinson & Brewer.*
Solicitor for defendant: *Albert Solomon.*

W. J. B.

1902
April 24, 25.

MACKENZIE *v.* HAWKE.

Gaming—House used for Betting—"Coupon Competition"—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1, 3.

The appellant was the occupier of an office in London and the proprietor of a newspaper, called *Football Chat*, published weekly at that office. T., the occupier of an office at Middelburg in Holland, conducted a "football coupon competition," that is to say, a scheme in which there was a promise by T. to pay a sum of money to such persons as should correctly guess the results of certain football matches, and should write their guesses on certain forms called coupons. The competition was advertised week by week in the appellant's newspaper, and the coupons were printed as part of the advertisement and could be procured at the appellant's office; they were, when filled up, to be cut out of the paper and sent with the entrance money to "*Football Chat*, Middelburg, Holland"; the names of the winners and the results of the competitions were also advertised in the appellant's newspaper. The appellant received for the insertion of these advertisements a sum considerably more than the charge for ordinary advertisements, but he had no other interest in the competition, nor had T. any interest in the newspaper. Upon the hearing of summonses against the appellant under the Betting Act, 1853, for (*a*) unlawfully permitting the office to be used by T. for the purpose of money being received by T. as the consideration for an undertaking to pay money on events or contingencies relating to the game of football, and (*b*) unlawfully keeping the office for the purpose of money being received by or on behalf of T. for the like consideration, a magistrate found that T., by permission of the appellant, used the appellant's office for the purpose of money being received by him as the consideration for his promise to pay money on the result of football matches, and that the appellant opened and kept the office for the purpose of the user by T.; he accordingly convicted the appellant:—

Held, that there was evidence on which the magistrate could properly find that the office was used as an essential part of the machinery for receiving money for an illegal purpose, and that the conviction was right.

Case stated by a metropolitan police magistrate.

Two informations had been preferred by the respondent against the appellant, Donald Mackenzie, under 16 & 17 Vict. c. 119 (The Betting House Act, 1853). The first information, under s. 3 of the Act, charged that the appellant, being the occupier of a certain office or place situate at 23, Bedford Street, unlawfully did on November 12, 1901, at 23, Bedford Street, knowingly and wilfully permit the said office to be used by one H. T. Terry, a person using the same, for the purpose of money or valuable things being received by or on behalf of Terry as and for the consideration for an undertaking or promise to pay or give thereafter money on events or contingencies of or relating to the game of football. The second information, under s. 1 of the Act, charged that the appellant being such occupier, on the same date and at the same place, unlawfully did open, keep, and use the office or place for the purpose of money or valuable things being received by or on behalf of Terry for the like consideration. The learned magistrate convicted the appellant, and fined him 100*l.* on the first and 1*s.* on the second information, with 20 guineas costs. The following facts were admitted or proved at the hearing.

On November 12, 1901, the appellant was the occupier of an office at 23, Bedford Street, Strand; he was also the registered proprietor of a weekly newspaper called *Football Chat*, and the office was the principal place at which the newspaper was published and the business thereof conducted. The H. T. Terry mentioned in the information had an office at Middelburg in Holland, and was to the appellant's knowledge conducting certain competitions known as sporting coupon competitions. These competitions were by agreement between Terry and the appellant advertised week by week in *Football Chat*, for which advertisements the appellant received pecuniary consideration amounting to about 27*l.* in each issue of the newspaper; in addition to this, the names of the prize-winners were periodically published in lists which were paid for at the same rate. The advertisements, which were headed "*Football Chat* Competitions," contained the rules and conditions subject to which the competitions were conducted. Part of the advertisements consisted of coupon sheets, on which intending competitors could fill in their selections; it was not obligatory on competitors to fill in their selections on the coupon sheets, and they were at liberty to use plain paper for the purpose. The advertisements were in form as follows: "Mr. H. T. Terry's (Middelburg) advertisement. *Football Chat* Football Skill Competition. 150*l.* for ten correct results, and 50*l.* in fifty consolation prizes of 1*l.* each. . . . Ten coupons for sixpence. Twenty-four coupons for one shilling postal order. . . ." A coupon sheet was printed below this, containing the names of coming football matches, spaces being left to be filled up by competitors with the names or numbers of the winning clubs. At the foot was printed, "Coupons must be addressed to *Football Chat*, Middelburg, Holland." The rules and conditions of the competition came next, and then the further notice, "Sole Address :—*Football Chat*, Middelburg, Holland." On the same page were printed statements that the paper was printed and published at 23, Bedford Street, Strand, and that that was its principal office.

All the moneys remitted by competitors in respect of the competitions were in the form of postal orders, and they, with their senders' selections, were in accordance with the advertised conditions sent by post addressed to *Football Chat*, at Middelburg. The postal orders were returned to this country for collection by the London and Westminster Bank, the proceeds being placed to the credit of one Blydenstein, Terry's agent, who paid the appellant by Terry's instructions for the advertisements. The appellant stated in his evidence that he had not received any benefit from the coupon competitions other than that accruing to him as payment for the insertion of the advertisements in his newspaper. Terry had no interest in *Football Chat* other than that accruing to him through advertising the coupon competitions therein, and he never made any personal use of the office except that he once called there.

The learned magistrate held that Terry was a person using the office at 23, Bedford Street, and that he used it for the purpose of money being received by himself as the consideration for his promise to pay money on the result of football matches. He also found that the appellant permitted the user by Terry, and that he opened and kept the office for the purpose of the user by Terry. He further found that the appellant derived benefit from the insertion of the coupon advertisements and lists of winners, for which he received considerably more than for ordinary advertisements, but that he did not share in the profits of the coupon competitions. He accordingly convicted and fined the appellant.

The question for the Court was whether the magistrate was right in law in so holding and finding. (1)

C. W. Mathews (*Stutfield* with him), for the appellant. The conviction is wrong. The proprietor of a newspaper published in London does not permit the user of his London office by a person resident abroad merely because he inserts in his newspaper an advertisement of that person's competition; there is no other relation than that of newspaper proprietor and advertiser. The coupon sheets are advertisements, and are to be returned, not to the appellant, but to the advertiser in Holland. The advertiser has not localised his betting business in the office of the newspaper: *Powell* v. *Kempton Park Racecourse Co.* (2) This is not an attempt to defeat the statute by a circuitous mode of getting the money into the appellant's hands, for he has no interest in the competitions, and Terry has no interest in the newspaper, and no question of agency arises. To justify a conviction, there must be a permission by the appellant of the user of his office by Terry for the purpose of conducting his business. On the facts of the present case Terry could not have been convicted of an offence under s. 1, for there was no such user of the office by him as would bring him within the Act; he carries on his business in Holland, and the mere issue in this paper of an advertisement or a coupon sheet does not make the newspaper office a place where a betting business is carried on. The case is distinguishable from *Stoddart* v. *Hawke* (1), for there the office in England was part of the machinery by which the newspaper proprietor conducted his own competition, and he could not escape liability by receiving the money at another office in Holland. The person who uses the office or place for a purpose prohibited by the Act must be there in control or occupation; his user must be in that character: see the judgment of Lord Halsbury L.C. in *Powell* v. *Kempton Park Racecourse Co.* (2)

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(1) By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . . ."

By s. 3 a penalty is imposed upon "any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them."

(2) [1899] A. C. 143.

Avory, K.C. (*J. K. Mackay* with him), for the respondent. The conviction was right. Under the principle of *Stoddart* v. *Hawke* (1), Terry could have been convicted of using the office, and the appellant clearly permitted the user. Terry used the office in the sense that he paid the appellant to issue and sell his coupons at that office; the price charged and received by the appellant was far in excess of his ordinary charge for advertisements, and the excess was the consideration for his selling Terry's coupons. The case cannot be distinguished from *Stoddart* v. *Hawke* (1) on the ground that there was no agency, for it is clear that in fact there was. The user which is contemplated by the Act is dealt with in clear language by A. L. Smith L.J. in *Powell* v. *Kempton Park Racecourse Co.* (3), where he says: "There must, however, be an user such as takes place in the keeping of a betting-house or office to be within the Act, and the user of a place in common with mankind in general is not such an user as is contemplated by the Act." The user of the office by Terry was far in excess of a user by mankind in general; he used it as the office for issuing coupons by means of which he got money sent to him in Holland. The coupon is on exactly the same footing as a betting-slip.

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(1) [1902] 1 K. B. 353.
(2) [1899] A. C. 143, at p. 159.
(3) [1897] 2 Q. B. 242, at p. 276.

Stutfield, in reply. There was no user of the office by Terry. The user contemplated by the section is a physical user by a man himself or his agent, of which there is no evidence. Even if Terry went to the office, he was only resorting to it, and not using it. No establishment is within the Act unless the business of betting is the business of that particular house: *Reg.* v. *Cook.* (1) The business of betting was Terry's and was carried on abroad; the business in London was that of a newspaper proprietor.

[LORD ALVERSTONE C.J. The finding of fact in the case is inconsistent with the existence of an independent newspaper business.]

That is a finding of law, and there was no evidence to support it. [He also cited *Reg.* v. *Brown.* (2)]

Avory, K.C., referred to *Hornsby* v. *Raggett.* (3)

LORD ALVERSTONE C.J. The appellant has been convicted upon two summonses under the Betting Act, 1853; the one charged him, as the occupier of a certain office or place, with permitting it to be used by a man named Terry for the purpose of money being received by or on behalf of Terry as and for the consideration for an undertaking or promise to pay thereafter money on events or contingencies relating to the game of football; the other, with opening, keeping, and using the office or place for the purpose of money being received by Terry or on his behalf for the like consideration. The facts may be shortly summarised.

At the office in question there was published by the appellant a paper called *Football Chat*; upon the last page of that paper appears what is called an advertisement of a football skill competition; of that competition it is unnecessary to say more than that it was clearly illegal within the decided cases. The

(1) (1884) 13 Q. B. D. 377.

(2) [1895] 1 Q. B. 119.

(3) [1892] 1 Q. B. 20.

coupons were to be filled up, cut out of the paper, and sent by post with the money to "*Football Chat*, Middelburg, Holland"; the names of the winners and the results of the competition were to be advertised in due course, and the prizes paid on a certain day; the sole address was "*Football Chat*, Middelburg, Holland," and the paper was printed and published at the appellant's office in Bedford Street. It was stated before the magistrate (though it is not found in the case) that the appellant had no interest in the competitions, and our judgment does not proceed upon the ground that the competitions were in reality conducted on his behalf. It is contended that there was no user by Terry of 23, Bedford Street for an illegal purpose, and that if there was no such user by him it followed that there was no permission by the appellant to him to use the premises. In this connection it is extremely important to consider carefully the magistrate's finding and see what it amounts to. There is a clear finding that the appellant opened and kept the office for the purpose of the user by Terry, and if there was evidence to support that finding, the case falls within the principle of more than one previous decision. The appellant contended that there was no such evidence; that there was nothing beyond the mere fact that the coupon was printed at and sent out from the office, and that this was not evidence of a keeping of the office for the purpose of a user by Terry. I think, however, that there was ample evidence to justify the conclusion at which the magistrate arrived. The coupons were an essential feature of the scheme; they were sent out from the office in Bedford Street in order that they might be filled up by competitors and sent to Terry in Holland; the operation was carried out at Bedford Street, where the paper was obtained, and amounted to a user by Terry of that place for the essential purpose of carrying out the scheme; there was, therefore, evidence that Terry used the office, and that the appellant permitted the user. There was no evidence of the existence of any independent newspaper undertaking; if there was one, it is difficult to understand why the money was to be sent to *Football Chat* in Holland, and why the competitions were described as *Football Chat* competitions. In *Stoddart* v. *Hawke* (1) it was held that the money need not be received at the office itself, the important point being that the place is used as an essential part of the machinery for receiving money for an illegal purpose. I think, therefore, that the findings of the magistrate are abundantly justified, and this appeal must be dismissed.

DARLING J. I am of the same opinion. It has been found by the magistrate, on evidence which cannot be disputed, that the appellant permitted Terry, who had an office in Middelburg, to advertise in *Football Chat*, and that in that paper were printed and issued coupons which could be procured at the office of the paper. It has been contended before us that there has been nothing more than the publication of an advertisement telling intending competitors where to go in order to get the coupons. But in this paper the appellant issued far more than a mere advertisement: he issued a series of coupons. It is true that the coupons formed part of the paper, but they were issued and used for the purpose of betting, and were part of the machinery by which Terry carried on his business of betting upon football matches. When we are considering the question whether the office was used for betting, it seems abundantly clear that Terry used the paper for that purpose, and that the paper was published at the office with Terry's coupons attached to it. That might in itself be enough to bring the office within the statute; but it is unnecessary to decide that question, and I abstain from deciding it, for the magistrate has found, not only that the appellant permitted the user of the office by Terry, but also that he opened and kept it for the purpose of such user, and that the appellant derived profit from such user, receiving, as he did, more than the ordinary charge for advertisements. I think that Terry did use the office for an illegal purpose within the meaning of the Act, and that he so used it by permission of the appellant, and therefore the appellant is liable under s. 3 of the Act for permitting an illegal thing to be done.

(1) [1902] 1 K. B. 353.

1902

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v.
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CHANNELL J. I agree. I base my judgment entirely upon the magistrate's finding, which in my opinion was justified by the evidence. The finding is that the office was opened and kept by the appellant for the express purpose of being used by Terry for the receipt of money in the way described; beyond all doubt the whole object of this newspaper was that it might be used for the purpose of working these competition schemes. This finding of fact beyond all question brings the case within the principle of *Reg.* v. *Stoddart.* (1) But for the finding, I should have felt some difficulty in the case; the user of an office or place, to come within the scope of the Betting Act, 1853, must be something in the nature of a physical user. The object of the Act was to put a stop to betting offices within the meaning put upon that term by a series of decisions, and a person who is to be held liable under the Act for using an office must use it in the character of owner, occupier, manager, or keeper: see the judgment of Lord Halsbury L.C. in *Powell* v. *Kempton Park Racecourse Co.* (2); or if he does not use it in that character, there must be a user by a person having some control in the conduct of the business. Therefore, if this were the case of two persons, one of them conducting a newspaper in England and the other in Holland carrying on a business for receiving money by betting, and there was merely an insertion of a bonâ fide advertisement in a bonâ fide newspaper, I think that such a user of the paper might not be a user of the newspaper office within the meaning of the Act of 1853. But upon the findings that point does not arise, and I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Edward M. Lazarus.*
Solicitors for respondent: *Malkin & Co.*

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(1) [1901] 1 K. B. 177.

(2) [1899] A. C. 143.

W. J. B.

HAWKE *v.* MACKENZIE (Nos. 1 & 2).

1902
April 25.

Gaming—House used for Betting—"Coupon Competition"—Information or Advice with respect to Bet or Wager—Advertisement—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1, 7—*Betting Act*, 1874 (37 *&* 38 *Vict. c.* 15), *s.* 3, *sub-s.* 1.

By s. 7 of the Betting Act, 1853, a penalty is imposed on any person publishing any advertisement whereby it is made to appear that any house, office, &c., is opened, kept, or used for the purpose of "making bets or wagers in manner aforesaid." The proprietor of a newspaper in England published an advertisement of an illegal football coupon competition conducted by a person resident abroad, the coupons for which were printed as part of the advertisement and were to be obtained at the office of the newspaper:—

Held, that the making of bets "in manner aforesaid" included all the modes of betting specified in s. 1 of the Betting Act, 1853, and was not limited to the class of betting described in the first branch of that section—that is, betting with persons "resorting to" the house, office, &c.—and that the proprietor of the newspaper was liable to be convicted upon a summons under s. 7.

By s. 3, sub-s. 1, of the Betting Act, 1874, a penalty is imposed upon the publication of an advertisement whereby it is made to appear that any person will on application give information or advice with respect to any bet or wager or any event or contingency mentioned in the principal Act —that is, the Act of 1853. The proprietor of the same newspaper published in it advertisements by persons offering to give information as to the probable winners of the football matches dealt with in the coupon competitions:—

Held, that the proprietor of the newspaper was liable to be convicted of an offence under s. 3, sub-s. 1, of the Betting Act, 1874.

Reg. v. *Stoddart*, [1901] 1 K. B. 177, followed.

Stoddart v. *Argus Printing Co.*, [1901] 2 K. B. 470, dissented from.

Two special cases stated by a metropolitan police magistrate, which were in substance as follows.

FIRST CASE.

An information had been preferred by the appellant against the respondent under 16 & 17 Vict. c. 119, s. 7, charging that the respondent, being the occupier of the office or place, 23, Bedford Street, did on November 12, 1901, unlawfully cause a certain advertisement to be published whereby it appeared that it was opened, kept, or used for the purpose of making bets or wagers. The learned magistrate dismissed the information.

The case stated that the respondent was the occupier of the office and also registered proprietor of a newspaper called *Football Chat*, and that the office was the principal one at which the newspaper was published and its business conducted. The newspaper contained an advertisement of a football coupon competition, and was procurable at the office by intending competitors. All the coupons filled up and despatched by the competitors, together with the accompanying remittances, were, in accordance with the instructions in the advertisements, addressed to "*Football Chat*, Middelburg, Holland," and remittances were to be made payable to H. T. Terry. The respondent stated in evidence that Terry was the sole promoter of the competitions and received all the money sent by competitors in respect thereof, and that all the profits derived from them belonged to Terry. The respondent swore that he had no interest in the competitions or the profits thereof except that derived from moneys received from advertising them in the newspaper, which amounted to about 27*l.* in each issue, and also the moneys arising from the periodical publication in the newspaper of the list of prize-winners, the number of which varied from time to time, the insertion of the lists being paid for at the same rate as the advertisements. Terry made personal use of the office by occasionally calling there. It was proved that the competitions for which the moneys were received were in respect of football matches, and they were described in the newspaper as "*Football Chat* Football Skill Competition," the address in Holland being given as "*Football Chat*, Middelburg, Holland."

Counsel for the appellant contended that the decision of the Divisional Court in *Stoddart* v. *Argus Printing Co.* (1) was not fully argued, as both parties had the same interest, and that it was inconsistent with the opinions expressed by several of the judges in *Reg.* v. *Stoddart* (2), and that the magistrate was bound by the latter decision. For the respondent it was contended—(1.) that the office was not opened, kept, or used for

(1) [1901] 2 K. B. 470.

(2) [1901] 1 K. B. 177.

the purpose of Terry making bets or wagers in manner prohibited by the Act; (2.) that the respondent did not advertise the office as being so opened, kept, or used; (3.) that the decision in *Stoddart* v. *Argus Printing Co.* (1) was binding on the magistrate, as it was subsequent to *Reg.* v. *Stoddart.* (2)

The magistrate held (as in the former case) that Terry was a person using the office, and that he used it for the purpose of receiving moneys in consideration of his promise to pay moneys on the events of football matches contrary to 16 & 17 Vict. c. 119, and that the respondent permitted the user by Terry, and that the respondent opened and kept the office for the purpose of the user by Terry; but he was of opinion that the case of *Stoddart* v. *Argus Printing Co.* (1) was binding on him, and therefore dismissed the summons.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law. (3)

Avory, K.C. (*J. K. Mackay* with him), for the appellant. The respondent should have been convicted. The words "for the purpose of making bets or wagers in manner aforesaid" in s. 7 of the Act of 1853 include all the offences aimed at in ss. 1 and 3, and are not limited to bets and wagers strictly so called, or to the offences dealt with in the first branch of s. 1. In *Stoddart* v. *Argus Printing Co.* (1) no doubt the strictest interpretation was placed upon the section, and it was held that an illegal advertisement within the meaning of s. 7 must be one which related to a house used for the purpose of making bets with persons resorting to it. But that case was not fully

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(1) [1901] 2 K. B. 470.

(2) [1901] 1 K. B. 177.

(3) By s. 7 of the Betting Act, 1853, a penalty upon summary conviction is imposed upon "any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers, in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers, in manner aforesaid, or any person who, on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers, in manner aforesaid . . . ."

1902

HAWKE v. MACKENZIE (Nos. 1 & 2).

argued: it was a friendly action in which both parties wanted the same decision; moreover, it is inconsistent with *Reg.* v. *Stoddart* (1), and should not be followed. There is no reason for limiting the operation of s. 7 to the first branch of s. 1. Sect. 7 is in fact the wider section of the two, for it includes "wagers," while the only things dealt with by s. 1 are "bets."

Stutfield, for the respondent. The advertisements prohibited by s. 7 are advertisements which relate to the kind of betting dealt with in s. 1—that is, betting with persons resorting to the house or place. The remarks made in *Reg.* v. *Stoddart* (1) as to the construction of s. 7 are merely obiter dicta, for s. 7 was not under consideration in that case, which turned wholly on s. 1. The actual decisions in that case and *Stoddart* v. *Argus Printing Co.* (2) are quite consistent with each other; it is only certain dicta in the former case which are inconsistent with the decision in the latter. A house cannot properly be said to be used for the purpose of making bets or wagers unless the bet or wager is made at the house, and there can in the present case be no bet until receipt of the coupon and money, which takes place in Holland. The office is not sufficiently connected with the advertisement.

Avory, K.C., in reply. The advertisement is an advertisement of this particular house, for any person can get the coupons by sending to the office of the paper. The whole paper is in reality the advertisement.

SECOND CASE.

Two informations had been preferred by the appellant against the respondent under 16 & 17 Vict. c. 119, and 37 & 38 Vict. c. 15, s. 3, sub-s. 1, charging that the appellant on November 12, 1901, unlawfully caused two advertisements to be published whereby it appeared that J. O'Reilly and J. Taylor (whose addresses were given) would on application give information for the purpose of or with respect to certain bets, wagers, events, or contingencies mentioned in 37 & 38 Vict. c. 15. The informations were dismissed.

At the hearing it was proved, as in the other cases, that the

(1) [1901] 1 K. B. 177.

(2) [1901] 2 K. B. 470.

respondent was the occupier of the office and the registered proprietor of *Football Chat*, and that the office was the principal one at which the newspaper was published and its business conducted. A copy of the newspaper for November 12, 1901, was put in evidence; it contained advertisements whereby it appeared that O'Reilly and Taylor respectively would on application give information with respect to certain bets, wagers, events, or contingencies with respect to the game of football; in other words, that they would send selections of the probable winners of the football matches dealt with in the coupon competitions.

For the appellant it was contended (as before) that *Stoddart* v. *Argus Printing Co.* (1) was not fully argued, and was inconsistent with *Reg.* v. *Stoddart* (2), which latter decision should be followed; and, further, that the decision in *Stoddart* v. *Argus Printing Co.* (1) did not itself apply to advertisements such as those in question. The respondent contended: (1.) That the advertisements did not relate to information to be given for the purpose of wagers to be made in any house or place prohibited by 16 & 17 Vict. c. 119. (2.) That the decision in *Stoddart* v. *Argus Printing Co.* (1) was binding.

The learned magistrate found the same facts as on the previous informations, but was of opinion that *Stoddart* v. *Argus Printing Co.* (1) applied to the advertisements in question and was binding on him, and dismissed the summons.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law. (3)

(1) [1901] 2 K. B. 470.

(2) [1901] 1 K. B. 177.

(3) By s. 3 of the Betting Act, 1874, "Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published—(1.) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager, or any such event or contingency as is mentioned in the principal Act, or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act; or . . . .; every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in the seventh section of the principal Act with respect to offences under that section."

1902

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v.
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Avory, K.C. (*J. K. Mackay* with him), for the appellant. The advertisements are within the express terms of s. 3 of the Betting Act, 1874; they are advertisements of information to be given with respect to bets or wagers; it is immaterial where the bets or wagers are made. The words "any such bet or wager, or any such event or contingency as is mentioned in the principal Act," are not limited to bets or wagers with persons resorting to the office—that is, to the kind of betting described in the first branch of s. 1 of the Act of 1853. *Cox* v. *Andrews* (1), upon which the magistrate partly relied, is only a decision that an admittedly genuine newspaper publishing an advertisement that a person will give advice on horse-races is no evidence of a house or place being used for the purpose of betting; in that case, too, the newspaper did not offer facilities for the carrying on of the business; in the present case facilities are given by the issue of the coupon sheets.

Stutfield, for the respondent. Assuming that the advertisements relate to these football competitions, *Cox* v. *Andrews* (1) is an authority that the case is not within the Act. The advertisement is not illegal, unless the bet to which it relates is made at a house which infringes the Act. Here, the coupon with the money was sent to the office in Holland, where the house is not within the Act.

LORD ALVERSTONE C.J. These two appeals involve practically the same point, although the summonses were taken out under different statutes. The first, which was under s. 7 of the Act of 1853, charged the respondent with causing an advertisement to be published whereby it appeared that the office was used for the purpose of making bets or wagers. The learned magistrate recapitulates the facts stated in the previous case of *Mackenzie* v. *Hawke* (2), and repeats his finding that Terry was a person using the office at 23, Bedford Street, for the purpose of money or valuable things being received by him as the consideration for his promises to pay money on the results of football matches; and he would have concluded that there was sufficient evidence to bring the case within s. 7,

(1) (1883) 12 Q. B. D. 126.

(2) Ante, p. 216.

but for the decision in *Stoddart* v. *Argus Printing Co.* (1), by which he considered himself bound. It has been contended before us, and I think rightly, that the principle and ground of the decision in *Reg.* v. *Stoddart* (2) is inconsistent with that case. By s. 7 of the Act of 1853 it is made an offence to publish any advertisement whereby it is made to appear that any office or place is used for the purpose of making bets or wagers "in manner aforesaid," which means, in the manner described in s. 1 of the Act. In *Stoddart* v. *Argus Printing Co.* (1) the action was brought for breach of a contract to print or publish a newspaper; the defendants contended that the contract was illegal because the newspaper contained an advertisement of a coupon competition which was an offence under s. 7 of the Act of 1853; while the plaintiff argued that the contract was good because s. 7 referred only to advertisements of places used for betting which would come under the first branch of s. 1—that is, betting with persons resorting thereto. The Court decided in favour of the plaintiff's contention. After considering the decision in *Reg.* v. *Stoddart* (2), and the grounds upon which it was based, I cannot think that s. 7 is so limited in its operation as it was held to be in *Stoddart* v. *Argus Printing Co.* (1) The language of the section is inconsistent with so limited a scope, for the mischief of advertising places which are used for the purpose of receiving money for betting purposes is just as great as that of advertising places which may be used for the purpose of betting with persons physically resorting thereto. I do not wish to lay too much stress on the fact that *Stoddart* v. *Argus Printing Co.* (1) was a "friendly" action, though it is true that it does not appear to have been strenuously argued on the part of the defendants; but if it is inconsistent with *Reg.* v. *Stoddart* (2), (and to a certain extent it clearly is) we must follow the latter case, which was a decision of the Court for the Consideration of Crown Cases Reserved, and by which we are bound.

The second summons raised, with a slight addition, the same point as to what are called tipsters' advertisements; this summons was taken out under s. 3, sub-s. 1, of the Betting

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(1) [1901] 2 K. B. 470.

(2) [1901] 1 K. B. 177.

Act, 1874. The magistrate found the same facts as to Terry's user, and considered himself bound by the decision in *Stoddart* v. *Argus Printing Co.* (1); he relied also on *Cox* v. *Andrews* (2), in which it was held, and in my opinion rightly held, that the Act of 1874 was an extension of the Act of 1853, and that the two Acts must be read together. If the limited construction, which I have already noticed, is to be placed on s. 7 of the Act of 1853, so as to confine its operation to the first branch of s. 1 of that Act, the same argument clearly might apply to the Act of 1874, and it might be maintained that s. 3, sub-s. 1, of the later Act, when referring to "such bet or wager," must receive the same limitation, and must be confined to bets made with persons resorting to a house or place kept for the purpose of betting. If we adopted the magistrate's view of the Act of 1853, it would be consistent to apply the same view to the Act of 1874; but as I am of opinion that he should have followed the decision in *Reg.* v. *Stoddart* (3), his decision upon this summons also must be reversed.

DARLING J. I am of the same opinion. I agree that the case of *Stoddart* v. *Argus Printing Co.* (1) is in conflict with *Reg.* v. *Stoddart* (3), and that the latter decision must prevail. Indeed, I think it right to say that I disagree with the former decision. In that case Phillimore J. says (4): "When one comes to examine that section carefully"—meaning s. 7 of the Act of 1853—"it seems clear that it is directed only against advertisements of houses kept for the purposes mentioned in the first part of s. 1—that is to say, for the purpose of betting with persons physically resorting thereto, and is not directed against advertisements of houses kept for the purposes mentioned in the second part of s. 1." But upon reading s. 7, I cannot agree that it is exclusively confined to the first part of s. 1, for it includes an advertisement of a house or room kept or used for the purpose of "exhibiting lists for betting," which is not forbidden by s. 1; it is plain, therefore, that s. 7 deals with at least one offence which is not mentioned in s. 1 at all.

(1) [1901] 2 K. B. 470.
(2) 12 Q. B. D. 126.
(3) [1901] 1 K. B. 177.
(4) [1901] 2 K. B. at p. 476.

To hold that the application of s. 7 to s. 1 is limited to the first branch of the latter section would be to place upon it a most technical and limited construction, which it is quite unnecessary to do, and which would have the effect of reducing one branch of s. 1 to a nullity. We must have some regard to the intention of the Legislature. They were not aiming merely at the person who resorts to a house or place in order to bet, but were endeavouring to put down a far more widespread public vice; this is shewn by their forbidding the exhibition of betting lists, to see which it is not necessary to resort to any particular house or place. Thinking as I do that *Stoddart* v. *Argus Printing Co.* (1) was wrongly decided, I must add that I cannot feel any surprise at that result; the case was launched in the most unsatisfactory way; it was a mock battle in which both parties were really interested in the same result being arrived at, and in which the argument for the defendant was short and perfunctory.

CHANNELL J. I agree. I will only add that in my judgment the word "bets" in s. 7 may refer to the first part of s. 1, and may mean bets with persons resorting to the advertised house or place, while "wagers" may refer to the second part of that section. I also agree that we are not bound by *Stoddart* v. *Argus Printing Co.* (1), which is in conflict with *Reg.* v. *Stoddart.* (2) As there is no appeal from our present decision we must decide between the conflicting decisions, and I have no doubt that *Reg.* v. *Stoddart* (2) is the one by which we are bound and which we ought to follow.

Appeals allowed.

Solicitors for appellant: *Malkin & Co.*
Solicitor for respondent: *Edward M. Lazarus.*

(1) [1901] 2 K. B. 470.
(2) [1901] 1 K. B. 177.

W. J. B.

1902
April 25.

HAWKE *v.* MACKENZIE (No. 3).

Justices—Penalty—Informer—Discretion to deprive Informer of Portion of Penalty—Metropolitan Police Courts Act, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 34—*Betting Act*, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 9.

Under s. 34 of the Metropolitan Police Courts Act, 1839, a metropolitan police magistrate has a discretion to deprive an informer of any share in a penalty inflicted under the Betting Act, 1853, although s. 9 of the latter Act expressly directs that one-half of the penalty is to be paid to the informer.

Case stated by a metropolitan police magistrate.

The case set out the informations already summarised in the report of *Mackenzie* v. *Hawke* (1), and the convictions and fines imposed. The case then proceeded: "I found also as a fact that the informer, the present appellant, was not guilty of corrupt practices; but I considered this to be immaterial: see 2 & 3 Vict. c. 71, s. 34, as amended by 53 & 54 Vict. c. 51, Sched. Part II.; and I adjudged that he should not receive any part of the penalties." Counsel for the appellant then contended that under the circumstances the informer was, by virtue of 16 & 17 Vict. c. 119, s. 9, entitled to one-half of the penalties, notwithstanding s. 34 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71).

The magistrate was of opinion that he had discretion to deprive the informer of the whole or any part of the penalties, although he did not think that the informer was guilty of corrupt practices.

The question for the opinion of the Court was whether upon the statement of facts the magistrate came to a correct determination in point of law. (2)

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(1) Ante, p. 216.

(2) By s. 34 of the Metropolitan Police Courts Act, 1839, "[Whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered is directed to be adjudged to the informer, and the same has been found to encourage the corrupt practices of common informers; for prevention thereof be it enacted that,] where by any Act now in force or hereafter to be passed a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being the party

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Avory, K.C. (*J. K. Mackay* with him), for the appellant. The magistrate had no discretion to deprive the appellant of a moiety of the penalty. The Betting Act, 1853, was passed fourteen years after the Act of 1839, and s. 9 enacts in positive terms that half the penalty is to be paid to the informer; the Legislature must be taken to have passed this section with full knowledge of the earlier enactment, and the appellant is entitled in law to half the penalty. Assuming, however, that the magistrate has a discretion, he can only exercise it for good cause. Looking at the preamble of s. 34 of the Act of 1839, it is clear that the discretion given by that section was given with the view of checking the corrupt practices of common informers, and it is only where the informer has been guilty of corrupt practices, or of conduct in the nature of corrupt practices, that the discretion can be exercised; here the existence of corrupt practices is expressly negatived. If the two statutes are inconsistent, the later one must prevail. [He cited *Reg.* v. *Titterton*. (1)]

The respondent did not appear.

LORD ALVERSTONE C.J. This case raises a different point from those with which we have already dealt. The respondent had been convicted and fined, and an application was made that a portion of the penalty should be paid to the informer, the appellant. The magistrate finds as a fact that the appellant had been guilty of no corrupt practice; but he exercised his discretion by ordering that no part of the penalty should be paid to him. The right of the appellant to receive a portion of the penalty depends upon two sections. By s. 9 of the Betting Act, 1853, "One-half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the

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aggrieved, it shall be lawful for any one of the said magistrates before whom the conviction shall be had to adjudge that no part or such part only of the penalty as he shall think fit shall be paid to the informer." The words within brackets were repealed by the Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51).

By s. 9 of the Betting Act, 1853, "One-half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the informer . . . ."

(1) [1895] 2 Q. B. 61.

informer," and if the matter rested there the appellant would be clearly entitled to succeed. But when that Act was passed, the Metropolitan Police Courts Act, 1839, was already in operation, s. 34 of which enacted, "Whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered is directed to be adjudged to the informer, and the same has been found to encourage the corrupt practices of common informers; for prevention thereof be it enacted, that where by any Act now in force or hereafter to be passed a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being the party aggrieved, it shall be lawful for any one of the said magistrates before whom the conviction shall be had to adjudge that no part or such part only of the penalty as he shall think fit shall be paid to the informer." In this case the magistrate very properly negatived the existence of corrupt practices on the part of the appellant; but he exercised his discretion by depriving him of all share in the penalty. It is contended before us that, the Act of 1853 having been passed fourteen years later, full effect must be given to the words "shall be paid to the informer." This contention is inconsistent with the existence of any discretion in the magistrate, and I think it goes too far, for s. 34 of the Act of 1839 in terms applies to any Act thereafter to be passed. I cannot get over the express words of that section, and cannot, therefore, accede to the main argument on behalf of the appellant.

Then it is contended that the discretion to deprive the informer of the moiety of the penalty can only be exercised for good cause, that is to say, for something in the nature of corrupt practices, or for some other good cause which operates on the mind of the magistrate. It is clearly impossible to confine the operation of the section to cases of corrupt practices, for, instead of so limiting it, a discretion is expressly given to the magistrate. I do not say that his discretion is an arbitrary discretion: it must be judicially exercised; and if no corrupt practices exist, I think that under ordinary circumstances the informer should have half the penalty; but it is impossible to say that the magistrate's discretion may not be exercised on other grounds than the existence of something in the nature of corrupt practices: it may well be that the amount of the penalty is large, and that the magistrate thinks that the informer ought not to be allowed to make a profit. In cases where no corrupt practices are suggested the magistrate must exercise his discretion judicially; he has done so in the present case, and I can see no ground for interfering with his decision. The appeal must be dismissed.

DARLING J. and CHANNELL J. concurred.

Appeal dismissed.

Solicitors for appellant: *Malkin & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1902
June 20, 23.

In re DRUCKER (No. 1).
Ex parte BASDEN.

Bankruptcy—Property of Bankrupt—Money advanced to Bankrupt for special Purpose—Payment to Creditor for withdrawal of Bankruptcy Petition—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), s. 44.

After the presentation of a bankruptcy petition the debtor's solicitor paid 300*l.* to the petitioning creditor, on condition that the petition should be dismissed, and it was dismissed accordingly. The 300*l.* was advanced by the solicitor, and the debtor gave him a security for it. The debtor was soon afterwards adjudicated a bankrupt upon the petition of another creditor, and the trustee in the bankruptcy applied for an order that the creditor who had received the 300*l.* should refund it:—

Held, upon the evidence, that the 300*l.* was impressed with a trust so that it could not be applied to any other purpose than in paying the creditor, and consequently that it did not form part of the bankrupt's general assets:

Held, therefore, that the case was governed by *In re Rogers*, (1891) 8 Morr. 243, and that the trustee was not entitled to recover the money.

Decision of Wright J., ante, p. 55, affirmed.

APPEAL against the decision of Wright J., ante, p. 55, where the facts are stated fully.

The trustee in the bankruptcy of Drucker applied to the Court for an order that a banking company, who were creditors of Drucker, should repay a sum of 300*l.*, which had been paid to them by Mr. Beyfus, Drucker's solicitor, on condition that a bankruptcy petition, which the company had presented against Drucker, should be dismissed. The petition was accordingly dismissed on February 15, 1901. Drucker was afterwards adjudicated a bankrupt on a petition presented by another creditor on March 6, 1901.

The 300*l.* was advanced by Beyfus, and Drucker, on February 14, 1901, gave him a security for it.

Wright J. dismissed the trustee's application, on the ground that the 300*l.* never became part of the general assets of Drucker, but was impressed with a quasi trust that it should be applied in payment of the bank.

The trustee appealed.

Herbert Reed, K.C., and *Carrington*, for the trustee.
Muir Mackenzie and *J. G. Joseph*, for the bank.

[The same cases were cited as in the Court below.]

VAUGHAN WILLIAMS L.J. If we accept the finding of the facts by Wright J., it seems to me that the case is absolutely concluded by the decision of this Court in *In re Rogers.* (1) This puts an end to the whole matter, unless we are prepared to differ from the conclusion of fact of Wright J. But, in my opinion, he arrived at a right conclusion upon the evidence. I think that the 300*l.* was impressed with a trust that it should be applied in paying the bank. In *In re Rogers* (1) all the judges based their decision upon the fact that the money there in question was impressed with a trust. I express no opinion upon any question which may arise between the trustee and Mr. Beyfus. The appeal will be dismissed with costs.

ROMER L.J. I am of the same opinion. In my view there never was a moment of time at which this money could have been used for any other purpose than that of paying the bank.

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(1) 8 Morr. 243.

Stirling L.J. concurred.

Appeal dismissed.

Solicitors: *King, Wigg & Co.; Ernest Salaman, Fort & Co.*

W. L. C.

EDGILL, Appellant *v.* J. & G. ALWARD, LIMITED, Respondents.

1902
June 24.

Ship—Fishing Boat—Seaman—Offences—Desertion or Absence without Leave—Wilful Disobedience—Desertion which is also Wilful Disobedience—Punishment—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 376, *sub-s.* 1.

A seaman may be convicted of the offence of wilfully disobeying a lawful command of the master, under s. 376, sub-s. 1 (*d*), of the Merchant Shipping Act, 1894, although the act of disobedience amounts to the offence of desertion or absence without leave under (*a*) or (*b*) of s. 376, sub-s. 1.

Case stated by the justices of Grimsby.

The respondents preferred an information against the appellant, under s. 376, sub-s. 1 (*d*), of the Merchant Shipping Act, 1894, alleging that he, being a seaman lawfully engaged to serve on board the fishing-boat *Andes*, did wilfully disobey a lawful command of the master of the vessel on January 25, 1902. The justices convicted the appellant and imposed a fine, or in default of payment four weeks' imprisonment.

The appellant was engaged by the respondents to serve as second engineer of the *Andes* under a running agreement for half a year from January 1, 1902. On January 22 the *Andes* arrived at the Grimsby Fish Dock from a fishing voyage, during which the appellant had acted as second engineer. On January 24 the appellant, being then at his work on board the *Andes* in the Grimsby Dry Dock, was ordered by the master to be on board at 6 a.m. on the following day, when the *Andes* was to start, to the knowledge of the appellant, on another fishing voyage. The appellant assented to the order, and was informed where the *Andes* would be lying at the time when he was ordered to join the ship. On January 25 the appellant did not go on board the *Andes* at all, and he could not be found. The vessel was in consequence detained for two hours and a half, until another second engineer could be engaged.

The justices found that the appellant understood the order given to him to be on board the *Andes*, but wilfully disobeyed the order without any excuse or reason for so doing.

For the appellant it was contended that he could not be convicted of wilful disobedience, under s. 376, sub-s. 1 (*d*) (1), because the vessel was in port; and also because, if he had committed any offence, it was the offence of desertion or being absent without leave, under s. 376, sub-s. 1 (*a*) or (*b*), and that, in cases amounting to desertion or absence without leave, s. 376, sub-s. 1 (*d*), was not applicable. For the respondents it was contended that on the facts the appellant had committed the offence of wilful disobedience, and that a seaman was not relieved from proceedings for wilful disobedience because the act of disobedience was also an act of desertion or of absence without leave.

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(1) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 376: "(1.) If a seaman lawfully engaged to serve in any fishing-boat, or an apprentice in the sea-fishing service, commits any of the following offences, that seaman or apprentice shall be liable to be punished summarily as follows:—

"(*a*) For the offence of desertion, he shall be liable to forfeit all or any part of the effects he leaves on board, and all or any part of the wages which he has then earned, and to satisfy any excess of wages paid by the skipper or owner of the fishing-boat from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him:

"(*b*) For the offence of absence without leave, that is to say for neglecting or refusing without reasonable cause to join or to proceed to sea in his fishing-boat, or for being absent without leave at any time within twenty-four hours of his boat's sailing from any port, either at the commencement or during the progress of the engagement, or for being absent at any time without leave and without sufficient reason from his boat,—if the offence does not amount to desertion, or is not treated as such by the skipper, he shall be liable to forfeit a sum not exceeding two days' wages, and in addition for every twenty-four hours of absence, either a sum not exceeding four days' wages, or any expenses properly incurred in respect of a substitute:

"(*d*) For the offence of wilful disobedience, that is to say for wilfully disobeying any lawful command during the engagement,—he shall be liable to imprisonment for any period not exceeding four weeks, and also to forfeit a sum not exceeding two days' wages:"

"(5.) A seaman or apprentice shall not be relieved by his refusal or neglect to go to sea or by his desertion from being liable to punishment under this section for an offence of wilful disobedience, continued breach of duty, or unlawful combination, and in addition to any such punishment shall also be liable to be punished for the offence of desertion or absence without leave."

The question for the opinion of the Court was whether the justices upon the above facts came to a correct determination and decision in point of law.

Hugo Young, K.C., and *Balloch*, for the appellant. The act of disobedience with which the appellant was charged was either desertion or absence without leave, which are offences specifically dealt with in clauses (*a*) and (*b*) of s. 376, sub-s. 1, of the Act. Those offences cannot be punished by imprisonment, whereas the offence of wilfully disobeying a lawful command of the master may be punished by imprisonment. The course of legislation upon this matter shews that it was intended that desertion or absence without leave should not be punished by imprisonment at all. By s. 243 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the offence of desertion was punishable by imprisonment; but s. 10 of the Merchant Shipping Act, 1880 (43 & 44 Vict. c. 16), subsequently provided that desertion or absence without leave should not be punished by imprisonment, and to that extent s. 243 of the Act of 1854 was repealed. Sect. 28 of the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41), which provided for the punishment of desertion or absence without leave from fishing-boats, did not provide for imprisonment for those offences, and s. 55 repealed s. 243 of the Act of 1854 so far as it was applicable to fishing-boats; and s. 376, sub-s. 1, of the Merchant Shipping Act, 1894, is a reproduction of those provisions. It is clear, therefore, that all cases of desertion and absence without leave are to be dealt with under clauses (*a*) and (*b*), and cannot be turned into the offence of wilful disobedience under clause (*d*) for the purpose of rendering the offender liable to imprisonment. The provisions of

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sub-s. 5 of s. 376 do not mean that, when the only offence is an act of desertion or absence without leave, the offender can for the same act be punished by imprisonment, but only that a man cannot escape punishment for wilful disobedience by deserting. A "lawful command" within clause (*d*) of sub-s. 1 means a command given while the vessel is at sea and not while she is in dock. That appears from the provisions of sub-s. 4, by which the provisions as to wilful disobedience are made to extend to apprentices "whether on shore or on board."

Avory, K.C., and *Bruce Williamson,* for the respondents. A lawful command is not confined to commands given while the vessel is at sea; there is nothing in the section itself, or in the reason of the thing, to so limit its meaning. Sub-s. 5 of s. 376 is clearly applicable to a case of this kind according to the plain meaning of its language, and expressly provides that a man may be punished for both offences if he has been guilty of both.

Hugo Young, K.C., replied.

LORD ALVERSTONE C.J. In this case we have to construe s. 376 of the Merchant Shipping Act, 1894. It is true that this Act is a consolidating Act, but I doubt whether the course of the legislation upon this matter can help us to construe this section. There are, in my opinion, two classes of offences contemplated by sub-s. 1 (*a*) and (*b*), and by sub-s. 1 (*d*) of s. 376. A seaman may desert or absent himself without leave under circumstances in which there would not be any wilful disobedience, in which case he would be liable to a lighter punishment under sub-s. 1 (*a*) or (*b*). The offence of wilful disobedience is made the subject of express enactment in sub-s. 1 (*d*), that is, when a seaman intentionally disobeys a lawful command, in which case he is liable to imprisonment. This construction of sub-s. 1 is supported by the provisions of sub-s. 5, which says that a seaman may be punished for both offences, for wilful disobedience and for desertion or absence without leave, if he has been guilty of both. With regard to sub-s. 4, it was probably inserted because apprentices are under discipline during the whole time of their apprenticeship. I do not think that it shews that in the case of a seaman sub-s. 1 (*d*) is confined to orders relating to his duty on board. In this case the justices have found that the appellant was under a running agreement for half a year, and that while at work on board the vessel he was ordered by the master to be on board at 6 A.M. on the following day, when she was to start on another voyage, and that he assented to that order, but that he did not go on board at all on the following day, and the vessel was delayed for some time while a substitute was procured. In my opinion, there was sufficient evidence that the appellant committed the offence of wilful disobedience to a lawful command during the engagement, and this appeal must be dismissed.

DARLING and CHANNELL JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *T. Protheroe Price, for Reed & Bloomer, Grimsby.*

Solicitors for respondents: *Williamson, Hill & Co., for Bates & Mountain, Grimsby.*

J. F. C.

1902
May 15.

SMITH *v.* SOUTHAMPTON CORPORATION.

Local Government—Rates—General District Rate—Appeal—Inclusion in Estimate of Retrospective Charges more than Six Months old—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 210, 218, 269.

By s. 210 of the Public Health Act, 1875, an urban sanitary authority may make a general district rate, which may be made either prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate. By s. 218 the urban sanitary authority, before making a general district rate under the Act, is to cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, which estimate is to be entered in the rate-book and to be open to public inspection; with a proviso that the estimate is not to be deemed part of the rate nor in any way to affect its validity:—

Held, that the proviso to s. 218 does not operate to take away the general right of appeal to quarter sessions against a general district rate given by s. 269 of the Act, where it appears from the estimate that payment of a debt more than six months old is to be made out of the rate.

CASE stated by the Recorder of Southampton upon an appeal against a general district rate.

Smith, who appealed to quarter sessions against the rate, but who, having regard to his position upon the argument in the Divisional Court, is in this report called the respondent, was a ratepayer at Thorley, a district which prior to 1895 formed no part of the county borough of Southampton, but which with other districts became part and parcel of the county borough by virtue of a provisional order of the Local Government Board, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 16) Act, 1895.

On June 12, 1901, the corporation, acting by the council of the borough as the urban sanitary authority, made a general district rate on the whole area of the borough to defray expenses incurred or to be incurred for the period commencing April 1, 1901, and ending March 31, 1902.

The corporation, before proceeding to make the general district rate, caused an estimate of the rate to be made pursuant to s. 218 of the Public Health Act, 1875, and the estimate was duly approved by the corporation on May 22, 1901. The estimate was duly entered in the rate-book, and was open to public inspection at the office of the corporation.

The total expenditure of the borough for the year ending March 31, 1902, was estimated at 110,454*l.* 4*s.* The amount of income, estimated apart from the rate, amounted to 14,379*l.* 6*s.* 6*d.*, leaving 96,074*l.* 17*s.* 6*d.* to be produced by the rate.

The respondent appealed against the rate on various grounds set out in his notice of appeal, and contended that the rate was bad because it included retrospective charges, and in particular certain charges which had been incurred or become due more than six months before the rate was made, contrary to s. 210 of the Public Health Act, 1875. The principal items objected to were the following: (1.) 1463*l.* 3*s.* 10*d.*, balance of suspense account for 1900 upon electricity works; (2.) 220*l.* 11*s.* 10*d.*, deficit for the year ending March 31, 1900, on the electricity account; (3.) 2154*l.* 8*s.* 1*d.*, one-fifth liability to bank, pursuant to resolution of the council of March 27, 1901; (4.) 903*l.* 0*s.* 4*d.*, due on capital and suspense accounts.

As to items 1 and 2, it appeared that in the years ending March 31, 1898, and March 31, 1899, there was a deficit on the working of the electricity works resulting in a debit balance of 1828*l.* 19*s.* 9*d.*; on March 31, 1900, one-fifth of that sum was written off and charged to net revenue account, reducing the suspense account to 1463*l.* 3*s.* 10*d.*, which was item 1. A further deficit of 220*l.* 11*s.* 10*d.* on the working for the year ending March 31, 1900, was item 2.

Item No. 3 (2154*l.* 8*s.* 1*d.*) was one-fifth of a sum of 10,772*l.* 0*s.* 5*d.* outstanding on special suspense account, as to which the council passed a resolution on March 27, 1901, that the balance of liabilities omitted in the estimate for the year 1900–1901 be placed to a special suspense account and spread over a period of five years. The sum of 10,772*l.* 0*s.* 5*d.* was the amount placed to the special suspense account under this resolution.

Item No. 4 (903*l.* 0*s.* 4*d.*), which appeared in the estimate as "one-fifth of expenditure payable out of revenue," represented one-fifth of 4515*l.* 1*s.* 8*d.*, the total (less sums credited) of some seventeen items in respect of works done from the years 1879 to 1898. Subject to the contention of the corporation hereinafter stated, it was not proved when any of these items were paid, although it was stated by the borough treasurer that they had been paid to the respective tradesmen by cheques on the bank; but the books shewed that the items had been carried forward from year to year as owing, and they still appeared in the books to be owing.

The corporation did not deny that these four items were retrospective charges, but contended that there was no proof that they were included in the rate at all, and that, as the estimate was not to be deemed part of the rate nor in any respect to affect its validity, it ought not to be received in evidence, and that the estimate did not shew that any of the items were included in the rate. In the published estimate of the rate, in addition to the estimated income on the credit side, it was stated that 96,074*l.* 17*s.* 6*d.* was required to be raised by a district rate to meet the various items referred to, and the same sum appeared upon another page apportioned between the various parishes for the purpose of the rate. Under these circumstances, the four sums being included in the estimate, which was the only means available to a ratepayer to discover what was to be included in the rate itself, and which was published by the corporation themselves, the recorder came to the conclusion that there was primâ facie evidence that the sums were included in the rate, and in the absence of rebutting evidence he found as a fact that the items were included in, and were to be met out of, the rate. He further held that, even if the corporation were at liberty to appropriate the balance income of 14,379*l.* 6*s.* 6*d.* to the items objected to (which there was no evidence that they had in fact done), yet, inasmuch as the effect would still be to increase the rate by the amount of those items, the rate would be equally retrospective both in law and fact as if no such appropriation had been made.

The corporation also contended that the four sums were not incurred, and did not become due, more than six months before the making of the rate, but formed part of the overdraft of 161,794*l.* 8*s.* 8*d.* due to their bankers on June 13, 1901, and that the liability of the respondents to their bankers on this overdraft had been incurred since December 13, 1900, by reason of the payment to their credit of 456,351*l.* 15*s.* 1*d.* between December 13, 1900, and June 13, 1901. The corporation contended that such items did not exist as charges, but were covered by the current overdraft, which, being balanced every day, was not a charge incurred more than six months prior, and that so far as the original creditors were concerned, they had been paid, but with money borrowed from the bank.

For some years the banking account of the corporation had been constantly overdrawn, but they had been accustomed to pay from time to time by cheques drawn on the bank, who debited the corporation account with the amount. The payments into the bank, whether derived from rates, money borrowed, or other sources, were credited as and when received in the account, which was balanced daily. There was no occasion after the end of 1896, when the account was not overdrawn.

It was proved with regard to the item of 1463*l.* 3*s.* 10*d.* (balance of suspense account), that so long as the items appeared in a suspense account, so long the items were not paid so far as the ratepayers were concerned. The explanation given in evidence of the meaning of a suspense account was that when debts had been incurred which could not conveniently be met at the moment, they were transferred into a suspense account until it became convenient to pay them. Except in the one instance of the 2154*l.* 8*s.* 1*d.*, the charges did not appear in the estimate as a debt due to the bank; they appeared as liabilities already incurred on March 31, 1900, which was more than six months before the making of the rate, and that they were so the recorder found as a fact.

The corporation further contended that the inclusion of the sums or one or more of them in the rate was not a ground for quashing the rate.

1902

SMITH v. SOUTHAMPTON CORPORATION.

The recorder found that the four sums were proved to be for charges incurred more than six months before the making of the rate, and that they did not come within any of the exceptions to the general rule that a retrospective rate is bad. He further held that, inasmuch as the corporation had no statutory or other authority to borrow from their bankers for the purpose of discharging old liabilities, the form in which the account between the corporation and the bank was kept did not prevent the rate from being retrospective. He therefore held the rate to be bad, and quashed it. (1)

Macmorran, K.C. (*Emanuel* with him), for the corporation, the appellants. These charges are not retrospective, but, assuming them to be so, the wrong course has been adopted in appealing against the rate. No doubt a general right of appeal is given by s. 269 of the Public Health Act, 1875, but that does not apply where the ground of the appeal against the rate is that the estimate contains charges which are alleged to be retrospective or otherwise improper. Sect. 98 of the Public Health Act, 1848, provided for the preparation of an estimate before the making of a rate, shewing the sums required for each of the purposes for which the rate was made, &c., and under that section it was held in *Reg.* v. *Worksop Local Board* (2) that the rate was bad on the ground that the estimate contained an illegal charge. That view was questioned in the second case of *Reg.* v. *Worksop Local Board* (3), and no doubt in consequence of that decision s. 218 of the Public Health Act, 1875 (which was substituted for s. 98 of the Act of 1848), contains the additional provision that the estimate "shall not be deemed part of the rate, nor in any respect affect the validity of the same." The effect of s. 218 is to take away the right of appeal against the rate on the ground of the improper inclusion of items in the estimate, and the proper course to take in the present case was to adopt the procedure laid down by s. 141 of the Municipal Corporations Act, 1882, and remove the alleged improper orders of the council for payments of money out of the borough fund into the King's Bench Division for the purpose of being quashed.

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(1) The case raised a further question as to the areas properly chargeable with certain items included in the rate and charged upon the whole borough. This point, which depended upon the construction of certain paragraphs of the provisional order, it is unnecessary to report.

(2) (1857) 21 J. P. 451.

(3) (1865) 5 B. & S. 951.

Secondly, it is lawful to pay debts more than six months old out of revenues other than rates, and the facts stated in the case shew that the corporation had sufficient income for these items to have been so paid; there is no proof that they were included in the rate at all.

Further, the debts to the various creditors having been paid by means of the bank overdraft, they had ceased to exist as separate charges and were covered by the current overdraft, which, being balanced daily, was not a charge incurred more than six months prior to the construction of the rate. [The argument on the construction of the provisional order is omitted.]

Foote, K.C., and *Forder Lampson*, for the respondent, were not called upon.

LORD ALVERSTONE C.J. The questions raised in this case are of some importance, and also, until clearly explained as they have been, of some little difficulty. Before dealing with the facts, I will say a few words as to the law applicable to the case. By s. 210 of the Public Health Act, 1875, a general district rate, which when collected forms part of the general district fund, is to be levied in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate; in calculating the period of six months during which the rate may be made retrospectively, the time during which any appeal or other proceeding relating to such rate is pending is to be excluded. There is thus an express statutory prohibition against allowing the inclusion of retrospective payments beyond the period of six months. Therefore the matter is obviously one of importance, and the Legislature has met the difficulty which corporations and other public bodies would otherwise have felt in making those payments by fixing the six months' limit. Then a general right of appeal is given by s. 269, and, notwithstanding the argument which has been addressed to us, I think that primâ facie it would be extremely difficult for us to hold there was no right of appeal in respect of a rate which purported to be levied to meet charges not authorized by s. 210. The existence of this right of appeal was expressly decided in 1857 in *Reg.* v. *Worksop Local Board.* (1) At the time of that decision the concluding words of s. 218 with regard to the operation of the estimate were not in the Public Health Act, 1848, which was the then governing statute, and it has been contended before us that the effect of the addition of the words "the estimate shall not be deemed part of the rate nor in any respect affect the validity of the same" is that a person has no right of appeal in respect of an allegation that the rate includes the payment of a charge more than six months old. In my opinion, however, it would require far stronger language to take away the existing right of appeal, which had been previously given by statute. I agree that the words were probably added in consequence of the discussion in *Reg.* v. *Worksop Local Board* (2), but they are insufficient to have the effect of taking away the right of appeal. It is not necessary for us to say what is the limit and what is the full effect of these words. I think that they would be sufficient to prevent an objector from relying on a mere defect in the estimate, or on the way in which the estimate had been made up, or possibly to prevent his marshalling the items in the estimate so as to shew that, if looked at in a particular way, it would indicate the payment of a debt more than six months old. But I do not think it can have been intended that, if upon the facts appearing upon the appeal to quarter sessions it is established that there is a payment of a debt more than six months old which will be discharged out of the moneys to be raised by the rate, the right of appeal is gone; that is, in effect, a contention that the section means that the estimate cannot be looked at in order to ascertain the true facts. Of course it might be open to the corporation to call evidence to shew that the estimate did not represent the real state of the facts; but

(1) 21 J. P. 451.

(2) 5 B. & S. 951.

it is going too far to say that the estimate may not be looked at for the purpose of making out a primâ facie case on appeal.

But though it is not necessary to decide the exact effect of these words of limitation, there seems to be no reasonable doubt on that point when we look at the facts of this particular case. It appears that there was included a balance of a suspense account upon electricity works for the year 1900, in which year there was a deficit upon that account, the liability to the bank in respect of it being 2154*l*. 8*s*. 1*d*., and in addition 903*l*. 0*s*. 4*d*. due on capital and suspense account. This sum of 2154*l*. 8*s*. 1*d*., which was one-fifth of the total liability to the bank on a special suspense account, was included in the estimate in pursuance of the resolution of March 27, 1901, that the balance of liabilities from the estimate for 1900–1901 should be placed to a special suspense account and spread over a period of five years. There was another resolution, practically identical, with regard to the 903*l*. 0*s*. 4*d*., which represents one-fifth of 4515*l*. 1*s*. 8*d*., the total of certain items in respect of works done in the years and on the objects specified. In that state of affairs it appears that, in order to meet the items which had been incurred beyond the period of six months, it was necessary as a matter of debtor and creditor account to raise this general district rate amounting to over 96,000*l*.; and, therefore, unless the corporation are able to shew that this was a mere matter of book-keeping and that they were in fact meeting these accounts out of another purse than that which would be filled by the general district rate, there was evidence upon which the recorder was entitled to come to the conclusion that they were paying these debts out of the rate. The first broad contention seems to be untenable for the reasons given by the learned recorder. It was contended that they had borrowed from their bankers and had by that means paid their tradesmen; that the whole had become a debt due to the bank, and that it must be assumed that the rate was raised to meet that debt. But if that argument were allowed to prevail, it would only be necessary to borrow money from the bankers to pay the debts in order to defeat altogether the provisions of s. 210. The other argument was, that it might be assumed that these debts would be paid out of the 14,000*l.*, which were receipts other than the 96,000*l.* raised by the general rate. I think that the recorder was right upon that point also, and that even if that is done the amount is increased, and, therefore, these debts are in reality paid out of the rate. But I do not rely so much upon that, for I can imagine a case in which, the estimate having been made in a way which primâ facie would shew that the general rate was being raised in order to pay such items as these, the corporation or other charging authority would be able to shew that, if the accounts were properly arranged and the receipts properly marshalled, there was no money coming out of the general district rate; for instance, the case put during the argument by my brother Channell of the corporation possessing real property or other property producing income which was not subject to the restrictions that the general district rate was subject to. Therefore, without in any way suggesting that the corporation might not under certain circumstances be entitled so to explain what the estimate would shew, I think that upon the facts established in the present case there was a clear breach of s. 210.

One other matter remains for notice. If it had turned out that there had been large payments on capital account, and the accounts were complicated by the inclusion of such payments which were not properly chargeable against this general district rate, and that this would be met by a future loan, I am not prepared to say that such an illegality could be relied upon, if in fact it was established that the ultimate adjustment of the accounts would not make any of the debts payable out of the general district fund more than six months old. It is unnecessary to decide that point; but I was impressed by the argument that in such a case the mere illegality of the borrowing might not be sufficient to justify an objection to the rate; I desire, however, to express no opinion on the point one way or the other. That disposes of the first objection, that is, the objection that debts more than six months old were to be defrayed out of the general district rate. [His Lordship then dealt with the point arising upon the construction of the provisional order.]

DARLING J. I am of the same opinion.

CHANNELL J. I entirely agree with the judgment of my Lord, but I should like to point out what is the real meaning of the objection that a rate is retrospective, which I think this rate clearly was. It means that any ratepayer is entitled to say that he is being charged with a sum which ought to have been charged upon and paid by the ratepayers in previous years. The principle is that these bodies are only entitled to charge upon future ratepayers present expenditure so far as they have statutory borrowing powers; the effect of their borrowing powers is to enable them to charge instalments of present expenditure upon future ratepayers, and borrowing powers are granted upon the understanding that the capital expenditure benefits the future ratepayers. Subject, therefore, to their borrowing powers, corporations and bodies of this character have no right to charge future ratepayers with present expenditure, and that is a principle which, as is well known, has for a long time been applicable to poor-rates; under the majority of rating statutes, too, the same kind of principle is applicable, but the extent of what is permissible depends upon the construction of the language of the particular statute. In this statute there is a clause permitting retrospective payments or retrospective rating (I draw no distinction between the two at present) within a limit of six months, and the question is what that means. Of course the clause is intended to prevent the obvious inconvenience that would arise if these bodies were bound to pay cash down in respect of every item of expenditure incurred; practically that cannot be done, and there must be a limit of time, which the statute has fixed at six months.

The argument of the corporation seems to come to this: that the effect of the six months' clause is that the local authority may always have a floating debt arising from past expenditure, provided that that floating debt does not exceed six months' income; because if it does not exceed six months' income they can always by an adjustment of accounts and by borrowing the money from their bankers say that the debt has been incurred within the last six months. If their floating debt exceeded that amount, it is obvious that no adjustment of accounts could possibly have that effect. But I think that this is not a matter of adjustment of accounts at all: it is a matter of substance; and, looking at the resolutions that were passed, it is clear that the appellants had in fact been exceeding their borrowing powers and had incurred this sort of floating debt. Looking at the judgment of the recorder, which is made part of the case, it appears that they have secured the services of an accountant who has drawn their attention to it, and that they have been making an effort to clear off this floating debt by charging so much to each year until they get the matter straight. However laudable such a course may be, the way in which it has been done is clearly to charge upon the present ratepayers expenditure which really was incurred in past times for more than six months before this rate was made, and which was not covered by their borrowing powers.

Nothing that I am saying, and nothing that my Lord has said, is to be taken as in any way suggesting that there would be anything wrong in the course which must practically always be taken, that is, in raising temporary loans within the limits of the borrowing powers in respect of matters which require to be paid quickly, the local authority intending at some future date to raise one large loan by an issue of stock, and having necessarily to incur some small expenditure before the loan is raised; obviously a temporary loan from the bankers for such a purpose would stand upon a very different footing from what has been done here. Without dealing with the question of the form of the estimate or any similar question, it is quite clear that as a matter of substance this rate was in fact raised to a certain extent for the purpose of paying past expenditure incurred for more than six months before. With regard to s. 218, which says that the estimate is not to be a part of the rate, I think it really means that the rate need not be perfect on the face of it. It is meant to meet the objection in *Reg.* v.

Worksop Local Board (1), that there was an insufficient item on the rate, so that there might be as it were a demurrer to the estimate on the ground that it did not shew that all the items were justified. That is a very different thing from using the estimate for its legitimate purpose of shewing what in point of fact was the purpose for which the rate was made, to which I see no objection; but whether or not the estimate is looked at in the present case, it seems clear that this rate was made for a retrospective purpose.

Appeal dismissed.

Solicitors for appellants: *Prior, Church & Adams, for Town Clerk, Southampton.*

Solicitors for respondent: *Speechley, Mumford & Co., for Ensor, Southampton.*

W. J. B.

HUNTER *v.* THE KING.

1902
June 19.

Revenue—Income Tax—Deductions—Premium on Life Insurance—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 54.

The suppliant effected an insurance on his life for 1500*l.* upon the terms that the annual premium for the first seven years should be 66*l.*, and that the insurers should in each year advance to him by way of loan one-half of that sum, and that he should pay interest annually upon the amount advanced and be personally liable to repay the same, and that the advances and interest should be a first charge upon the policy. In each of the first three years the suppliant paid 33*l.* in cash in respect of the premium, and was debited with the remaining 33*l.* as a loan, and he paid interest annually in respect of those loans:—

Held, that the suppliant had paid an annual premium of 66*l.*, and was entitled to deduct that sum from the amount of his assessment to income tax, under s. 54 of the Income Tax Act, 1853.

Special Case stated by consent in a petition of right.

On June 30, 1896, the suppliant effected an insurance on his life for 1500*l.* with an insurance company. The policy recited that 66*l.* 17*s.* 6*d.* (including an advance of 33*l.* under clause 1 thereof), being the premium until June 30, 1897, had been paid to the insurers, and provided (clause 1) that if the renewal premium was regularly paid the sum assured would be paid on the death of the assured, provided that, until the renewal premium should have become subject to reduction under clause 2, 33*l*. of the renewal premium should, if the assured so desired, be advanced by the insurers, and be with the recited advance of 33*l*. a first charge on the policy, subject to the conditions of clause 4; and (clause 2) that after the premium for seven years should have been paid, the renewal premium should be subject to any reduction which might be declared by the directors; and (clause 4) that the insurers might at any time advance moneys (but should not be bound to do so) for payment of any sum necessary to prevent the lapsing or avoidance of the policy, and that every such advance should bear interest at 4 per cent., payable on every renewal date, during the continuance of the advance, and that the advance and interest should be a first charge on the policy and sum assured.

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(1) 5 B. & S. 951.

For the premium paid on June 30, 1896, the suppliant received a receipt for "the sum of 66*l*. 17*s*. 6*d*. (including 33*l*. advanced by the association), being the first premium on an assurance of 1500*l*."; and for the premiums due in June, 1897 and 1898, the receipts were for "the sum of 66*l*. 17*s*. 6*d*., being the amount of one year's premium for the assurance of 1500*l*."

By an agreement dated July 19, 1897, the suppliant acknowledged that he had received from the insurers two sums of 33*l*. each by way of loan, and, in consideration thereof and of five further sums of 33*l*. to be advanced to him by way of loan under the terms of the policy, he charged the policy and all moneys and benefits thereby assured as security for repayment to the insurers of the principal sums advanced and to be advanced with interest at 4 per cent. as mentioned in the policy; and agreed to pay to the insurers the said principal sums and interest, and as long as the said principal sums or any part thereof remained due and owing to pay interest thereon at the rate aforesaid on the agreed day in each year; and to pay the premium and all other moneys required for keeping up the policy; and that the insurers should not be bound to receive any payment of premium on the policy while any interest was due to them and unpaid; and he declared that in case of default the insurers might cancel the policy, but that the surrender value of the policy at the time of cancellation should be applied in satisfaction of the security created by the agreement or the policy; and that the security of the agreement should be additional to any security contained or implied in the policy.

The suppliant in each year paid interest at 4 per cent. upon the amount of the principal sums for the time being outstanding on the security of the charge. No advance in cash was made by the insurers to the suppliant, and the only moneys which passed from the suppliant to the insurers in respect of payment of premium was the sum of 33*l.* 17*s.* 6*d.* in each year; but the suppliant was debited in the loan register of the insurers with the amount of the principal sums secured by the charge. The premiums were treated as having been paid in full in the calculation made for the reduction of the premiums subsequent to the seventh; and the principal sums secured by the charge were included in the balance-sheet published by the insurers, pursuant to the Life Assurance Companies Act, 1870, under the head " Loans on the Association's Policies."

For the three years ending April 5, 1899, the suppliant was assessed to and paid income tax upon an assessment based upon the assumption that he was entitled to deduct only the sum of 33*l.* 17*s.* 6*d.* in respect of the premium for the said policy, and he claimed to be allowed the full sum of 66*l.* 17*s.* 6*d.* as a deduction, under s. 54 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34). The suppliant by this petition of right claimed repayment of 3*l.* 6*s.*, being the income tax charged on the sum of 33*l.* for the three years in question. The Crown waived any objection that a petition of right would not lie.

The question for the opinion of the Court was whether the suppliant was entitled to deduct from his assessment the sum of 66*l.* 17*s.* 6*d.* as being the annual sum paid by him in respect of premium, within the meaning of s. 54 of the Income Tax Act, 1853.

Sir E. Clarke, K.C., and *R. B. D. Acland*, for the suppliant. The very short question in this case is what is the amount of the premium which the suppliant has paid, within the meaning of s. 54 of the Income Tax Act, 1853, which provides that a person who has insured his life may deduct the amount of "the annual premium paid by him for such insurance" from his assessment to income tax. Upon the facts of this case it is clear that the suppliant has paid the whole premium of 66*l.* 17*s.* 6*d.*; he paid one-half in cash and borrowed the other half from the insurers, making himself personally liable to repay the loan and paying interest therefor. The transaction is exactly the same as if he had borrowed half the amount necessary to pay the premium from any third person and had then paid the full sum to the insurers. It cannot make any difference whether the assured borrows money to pay the premium from third persons, such as his bankers, or from the insurers themselves.

Sir R. B. Finlay, A.-G., and *Rowlatt*, for the Crown. The real substance of this transaction must be looked at. In substance this was not a payment of the full premium at all. The very inducement and object of this form of insurance is that the assured pays only one-half of the nominal premium during the first seven years. It is that very advantage which leads people to adopt this form of insurance. The object and intention of s. 54 is to allow the assured to deduct that sum which he has actually paid for insuring his life; and the whole intention of this transaction is that the assured shall pay only one-half the nominal premium, and he does pay only one-half. If the assured really borrowed money to pay the whole premium the case would be different; here there was no real loan, but a contract that only one-half the premium should in fact be paid.

PHILLIMORE J. This case raises an important but short question under the Income Tax Act, 1853. Sect. 54 of that Act, which I have now to construe, provides that any person who has made insurance on his life "shall be entitled to deduct the amount of the annual premium paid by him for such insurance" from the income in respect of which he is liable to be assessed. The question here is what is the amount of the annual premium which Mr. Hunter has paid. Nominally he has paid 66*l*. 17*s*. 6*d*., but in hard cash he has paid only 33*l*. 17*s*. 6*d*. He contends that he is entitled to deduct the whole 66*l*. 17*s*. 6*d*., while the Crown contends that he is entitled to deduct only 33*l*. 17*s*. 6*d*. Now, it is true that he has paid only 33*l*. 17*s*. 6*d*. in cash; but he has borrowed the remainder from the insurers and pays interest thereon, and is personally liable to repay that sum to them. In my opinion it makes no difference that he has borrowed from the insurers and not from some third person. I think that he has in fact paid the whole premium, though he has borrowed one-half of the amount from the insurers, for which he pays interest. If this were a case in which one-half of the premium was never paid, but remained only a charge upon the policy, and interest was not paid, the result would, I think, be different. But here interest is paid, and the assured is personally liable to pay the amount of the loan; and in my opinion the suppliant has paid the whole premium within the meaning of s. 54. I think that there has been payment of 66*l*. 17*s*. 6*d*., and that the suppliant is entitled to judgment.

Judgment for the suppliant.

Solicitors for suppliant: *Hunter & Haynes.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. F. C.

C. A.

1902

June 6, 10, 20.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.
Ex parte SMITH.

Bankruptcy — Bankruptcy Notice — Judgment Debt — Stay of Execution— Seizure by Sheriff and subsequent Withdrawal—No Return to Writ— Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

When the sheriff has seized goods of a judgment debtor under a fi. fa., the judgment creditor cannot have another fi. fa. upon the judgment until a return has been made to the first, even though he has abandoned the seizure.

Miller v. *Parnell*, (1815) 6 Taunt. 370, is a decision to that effect, and the authority of that case has not been shaken by *Peploe* v. *Galliers*, (1820) 4 Moore, 163, or by *Lee* v. *Dangar*, [1892] 2 Q. B. 337.

But, if under a fi. fa. the sheriff has seized only goods not belonging to the judgment debtor, the principle of *Miller* v. *Parnell* does not apply, and in such a case there is nothing illegal or irregular in the issue of a second writ of fi. fa. before any return has been made to the first. And in those circumstances there is nothing to prevent the judgment creditor from issuing a bankruptcy notice in respect of the judgment debt.

APPEAL against an order of the registrar setting aside a bankruptcy notice.

On January 25, 1902, H. A. Smith recovered judgment against the debtor for 409*l.* On February 11, 1902, Smith issued a writ of fi. fa. upon the judgment, under which the sheriff seized goods in the house in Surrey in which the debtor and his wife resided.

On February 14, 1902, solicitors, who were acting for the debtor's wife and for the trustees of the debtor's ante-nuptial settlement, gave notice to the sheriff that the wife claimed the greater part of the goods which he had seized, and that the trustees of the settlement claimed the remainder of the goods.

On February 18, 1902, at 2.15 P.M., the sheriff, in pursuance of instructions from the judgment creditor's solicitor, withdrew from possession of the goods. The sheriff did not make any return to the writ. On the same day, about 3.50 P.M., the judgment creditor issued against the debtor a bankruptcy notice for the whole of the judgment debt.

On the application of the debtor the registrar set aside the notice, on the ground that, the sheriff having made no return to the writ, there was no evidence whether the debt had been to any extent satisfied by the levy. The registrar was of opinion that he was bound by a decision of the Court of Appeal in *In re Cochrane.* (1)

The judgment creditor appealed.

Herbert Reed, K.C., and *Bartley Denniss*, for the judgment creditor. The question is, whether there is anything in the circumstances of this case in the nature of a stay of execution within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, so as to prevent the issue of a bankruptcy notice against the debtor. It is submitted that there is not.

The registrar felt himself bound by *In re Cochrane* (1), but that case was not fully argued. Moreover, it goes no further than *In re Follows* (2), which will also probably be relied upon on behalf of the debtor. That case, however, is distinguishable from the present, for there, after the sheriff had seized the goods and before he had made a return, a third party claimed the goods, whereupon an interpleader summons was taken out; and it was held that while the summons was pending, the judgment creditor could not issue a bankruptcy notice, because, until the interpleader had been decided, he was not in a position to issue execution: in short, there was an implied stay. *Ex parte Ford* (3) is to the same effect.

In the present case there has been no interpleader to cause a stay of execution under the existing judgment. The true test is this: that, although the judgment creditor had issued a writ of fi. fa. against the debtor's goods in Surrey and had withdrawn from possession under that writ, he would not have been precluded from issuing another writ of fi. fa. against the debtor's goods in another county: *Lee* v. *Dangar.* (4) So, when goods have been seized by the sheriff under a fi. fa., but it turns out that they belong to a third person, and the

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(1) (March 9, 1900) Unreported.

(2) [1895] 2 Q. B. 521.

(3) (1886) 18 Q. B. D. 369, 371.

(4) [1892] 1 Q. B. 231, 239; [1892] 2 Q. B. 337.

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A Debtor,
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sheriff then withdraws, the creditor is not precluded from issuing a writ of capias ad satisfaciendum by the mere fact that no return has been made to the writ of fi. fa.: *Knight* v. *Coleby* (1); *Edmond* v. *Ross* (2); *Dicas* v. *Warne.* (3) Why then should not the plaintiff here, finding that he could not enforce his writ of fi. fa., abandon it and make the defendant a bankrupt under the summary procedure provided by the Bankruptcy Act, 1883? It is going too far to say that there is a "stay of execution" within s. 4, sub-s. 1 (*g*), so as to prevent the service of a bankruptcy notice, when the judgment creditor is not in a position to "issue" execution. There is only a stay if he is not in a position to "enforce" execution: "enforcing" rather than "issuing" is what the judges meant in *Ex parte Woodall* (4), *Ex parte Ford* (5), and *In re Phillips.* (6)

[Romer L.J. "Enforcing" is, no doubt, the material thing.]

Sect. 4, sub-s. 1 (*g*), is of a quasi-penal nature, and must be construed strictly: *Ex parte Chinery.* (7) Here the judgment creditor is in a position to enforce the execution, and therefore it is not "stayed," and the sheriff can still proceed against any other goods of the debtor within his bailiwick. The sheriff having already seized has a qualified property in the goods: *Ex parte Williams.* (8)

[They also referred to *Walker* v. *Hunter.* (9)]

Muir Mackenzie, for the debtor. This case falls within the principle of *In re Follows* (10) and *In re Cochrane.* (11)

[Stirling L.J. According to *Ex parte Williams* (8) the sheriff, on seizure, has a qualified property in the goods: if he withdraws, does he lose his title?]

Under s. 1 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), the writ of fi. fa. cannot prejudice the title to the goods acquired by any person bonâ fide and for valuable consideration before the seizure. When there has been a levy under a writ, a fresh writ cannot be issued until there has been a return to the first writ: *Knight* v. *Coleby* (1); *Chapman* v. *Bowlby*. (2)

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(1) (1839) 5 M. & W. 274.
(2) (1821) 9 Price, 5.
(3) (1833) 10 Bing. 341.
(4) (1884) 13 Q. B. D. 479.
(5) 18 Q. B. D. 369.
(6) (1888) 5 Morell, 40.
(7) (1884) 12 Q. B. D. 342.
(8) (1872) L. R. 7 Ch. 314, 317.
(9) (1845) 2 C. B. 324, 334.
(10) [1895] 2 Q. B. 521.
(11) Unreported.

It is clear on the authorities that, to enable a judgment creditor to serve a bankruptcy notice, he must at the time be in a position to enforce his judgment by execution: *In re Phillips*. (3)

The true inference from the facts is that there has been a total abandonment of the execution. That being so, the old authorities shew—(1.) that the creditor could not issue a fresh writ until there had been a return to the first; (2.) that the sheriff could not re-enter under the old writ.

For (1.) *Miller* v. *Parnell* (4) is an authority. It shews that when a fi. fa. has been executed by seizure the creditor cannot have a writ of ca. sa. until the sheriff has made a return, even though the creditor has abandoned the seizure. This principle applies equally to the issue of a second fi. fa.

[VAUGHAN WILLIAMS L.J. That case was affirmed by *Andrews* v. *Saunderson*. (5)]

And its authority was also recognised in *Chapman* v. *Bowlby*. (6) After a complete abandonment the rights of third parties revive notwithstanding seizure.

The cases relied on for the appellant are distinguishable. In *Dicas* v. *Warne* (7) the goods were already in custodiâ legis. In *Knight* v. *Coleby* (1) the sheriff withdrew because the defendant informed him he had sold the goods.

[VAUGHAN WILLIAMS L.J. That decision was founded on estoppel.]

As to (2.), that possession cannot be resumed after abandonment, *Ackland* v. *Paynter* (8) is an authority: *Blades* v. *Arundale* (9); *Percival* v. *Stamp* (10); *Clerk* v. *Withers*. (11) It would be a good return to the writ to say that the sheriff had abandoned possession at the direction of the judgment creditor: *Levi* v. *Abbott.* (1)

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(1) 5 M. & W. 274.

(2) (1841) 8 M. & W. 249.

(3) 5 Morell, 40.

(4) 6 Taunt. 370.

(5) (1857) 1 H. & N. 725, 728.

(6) 8 M. & W. 249, 251.

(7) 10 Bing. 341.

(8) (1820) 8 Price, 95.

(9) (1813) 1 M. & S. 711; 14 R. R. 555.

(10) (1853) 9 Ex. 167, 171.

(11) (1704) 1 Salk. 322; 2 Ld. Raym. 1072.

[*Bartley Denniss*, for the judgment creditor. In *Lee* v. *Dangar* (2) Fry L.J. said that the seizure of a debtor's property under a writ of fi. fa. is not a satisfaction of the debt.

Vaughan Williams L.J. Could the creditor bring an action upon the judgment after the sheriff had withdrawn?

Bartley Denniss. It is submitted that he could. Seizure operates only to prevent third persons from obtaining priority. As between the debtor and the judgment creditor, the goods are bound as from the teste of the writ: *Ex parte Williams.* (3)]

In *In re Cochrane* (4) the creditor had abandoned the execution.

[Stirling L.J. There seems to have been a stay of proceedings, and there was no evidence that the stay had come to an end.

Bartley Denniss referred to *Angell* v. *Baddeley*. (5)]

Bartley Denniss, in reply. When the writ has been withdrawn the sheriff cannot re-enter without a fresh order from the execution creditor: *Shaw* v. *Kirby*. (6) This implies that the creditor can order the sheriff to re-enter.

[Romer L.J. Suppose the sheriff goes out, and ten minutes afterwards he finds he has made a mistake, and he then re-enters: what injury is done?]

To support an action against the sheriff there must be both a breach of duty and damage resulting from it.

The issue of the writ creates a charge upon all the goods of the debtor wherever situate. Seizure is material only as regards priorities. But for the rights of other creditors the sheriff might sell the debtor's goods without taking possession of them. The writ directs him to sell. The creditor is in a position to issue execution as soon as he has issued his writ: *Woodland* v. *Fuller*. (7)

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(1) (1849) 5 Ex. 588.
(2) [1892] 2 Q. B. 337, 350.
(3) L. R. 7 Ch. 314, 317.
(4) Unreported.
(5) (1877) 3 Ex. D. 49.
(6) (1888) 52 J. P. 182.
(7) (1840) 11 A. & E. 859.

[VAUGHAN WILLIAMS L.J. The sheriff could not bring trover before seizure.

ROMER L.J. But the creditor has a charge.]

And he can follow the goods, except as against a purchaser in market overt or under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 1).

It was possible there might be some goods in the house not included in the claims of the wife and the trustees, and the sheriff would have been entitled to seize those goods: *Walker* v. *Hunter*. (1)

[VAUGHAN WILLIAMS L.J. In that case the sheriff had not withdrawn; it does not follow that he could re-enter after he had withdrawn.]

The sheriff might seize other goods. The force of the writ was not spent, and that is sufficient to support a bankruptcy notice. It cannot be said that execution was stayed. Abandonment is a question of intention.

The whole of the goods seized were claimed by the wife and the trustees, i.e., they were the goods of strangers, and the writ did not authorize the sheriff to seize them. The debtor stood by, and cannot now be heard to say that his goods were seized. The sheriff withdrew because of the adverse claims; he had no intention of abandoning the debtor's goods. Abandonment is a question for a jury: *Ackland* v. *Paynter*. (2)

[STIRLING L.J. referred to *Bagshawes, Limited* v. *Deacon*. (3)]

In *Clerk* v. *Withers* (4) the judgment creditor had made an election.

[VAUGHAN WILLIAMS L.J. Seizure by the sheriff deprives the debtor of the power of selling his goods. The moment the sheriff takes possession the debt is pro tanto absolutely discharged, not indeed finally, but so long as that state of things continues. This has been so laid down in the successive editions of Chitty's Archbold's Practice for the last thirty years: vide Chitty's Archbold, 14th ed. vol. i. p. 869.]

In the present case all the goods were claimed by third parties; so there could not be a discharge of the debt. A judgment creditor is not bound to bring interpleader.

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(1) 2 C. B. 324.

(2) 8 Price, 95.

(3) [1898] 2 Q. B. 173.

(4) 1 Salk. 322.

Cur. adv. vult.

June 20. VAUGHAN WILLIAMS L.J. read the judgment of the Court (Vaughan Williams, Romer, and Stirling L.JJ.) as follows:—The question is, whether a bankruptcy notice ought to be set aside on the ground that at the time of the service of the notice a writ of fi. fa. had been delivered to the sheriff of Surrey and seizure had been made thereunder, and no return had been made by the sheriff. Now the case of *Miller* v. *Parnell* (1) is a plain authority for the proposition that, if a judgment creditor does cause the sheriff to execute his fieri facias by seizure, he cannot have a writ of capias till the fieri facias is completely executed and returned, and that this is so even though the execution creditor abandons the seizure of the goods. *Miller* v. *Parnell* (1) was recognised as good law in *Chapman* v. *Bowlby* (2), and by Pollock C.B. and Martin B. in *Andrews* v. *Saunderson* (3), in which latter case it was strenuously argued, but unsuccessfully, that the rule against the issue of a new fi. fa. had no application unless something had been realized under the first execution. But it is to be observed that in *Peploe* v. *Galliers* (4), on a special demurrer to a plea to a declaration in scire facias, the Court of Common Pleas held the plea bad, because it merely stated that the sheriff seized the debtor's goods and took them in execution, and did not proceed to state that the sheriff had returned the writ. The goods might have been restored to the defendant, and on this ground the plaintiff was entitled to judgment. This case certainly seems to assume that there may be a second writ if the goods seized under the first writ had been restored to the judgment debtor. But, be this how it may, this case, decided on special demurrer, cannot be taken to have overruled *Miller* v. *Parnell* (1), which was acted on in *Andrews* v. *Saunderson* (3) and in many other cases since *Peploe* v. *Galliers* (4), but, of course, it might nevertheless fortify this Court if we were disposed to review *Miller* v. *Parnell*. (1) There is one more observation we would wish to make on *Miller* v. *Parnell* (1), and that is that its authority does not seem to us to be impaired by the decision of the Court of Appeal in *Lee* v. *Dangar*. (2) In that case two writs of fi. fa., in the City of London and the county of London respectively, were issued concurrently, not in succession, and *Miller* v. *Parnell* (1) had therefore no application. Although we have thought it right, having regard to the argument before us, to make these observations on the authority of *Miller* v. *Parnell* (1), we do not think that, on the facts of the present case, *Miller* v. *Parnell* (1) has any application. It seems to us, on the evidence, that no goods of the debtor were seized. The debtor says so himself; and, although he goes on in his evidence to say that there were in the house pictures and personal property of his own, and although the sheriff's officer's evidence is not inconsistent with his having seized everything in the house, yet we do not think that it is open to the debtor to contend that property of his was seized, because we think the right conclusion of fact is, that the debtor, knowing of the claim of the trustees of the marriage settlement and of his wife—which covered everything in the house, although he might not know in what proportions his wife and the trustees respectively might claim—deliberately allowed the execution creditor to withdraw the execution and seizure and restore these goods to the claimants. Now *Miller* v. *Parnell* (1), in our judgment, applies only in cases in which there has been a seizure of goods of the judgment debtor—that is to say, of goods which the writ directs and authorizes the sheriff to seize—and has no application if the seizure is of the goods of a stranger. If the seizure is of goods which the sheriff is directed to seize under the fi. fa., the sheriff, if an action of trespass were brought for the seizure, would require the return to the writ to enable him to justify under the fi. fa.: *Hodgkinson* v. *Whalley* (3); and in *Andrews* v. *Saunderson* (4) Pollock C.B. pointed out that, on the question whether a

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(1) 6 Taunt. 370.
(2) 8 M. & W. 249.
(3) 1 H. & N. 725.
(4) 4 Moore, 163.

(1) 6 Taunt. 370.

(2) [1892] 2 Q. B. 337.

(3) (1831) 2 C. & J. 86.

(4) 1 H. & N. 725.

second writ of execution can issue without a return to the first, the test is, not whether there was a substantive levy, but whether anything has been done which renders the existence of the writ necessary for the justification of the sheriff. It follows from this that the principle of *Miller* v. *Parnell* (1) will not make the issue of a second writ of fi. fa. illegal or irregular in a case in which the seizure has been of goods other than those of the judgment debtor; for neither the writ, nor anything which the sheriff purports to do under it, can justify him if he has seized the goods of a stranger. In our judgment the seizure by the sheriff of the goods of a stranger not only does not make the issue of a fresh writ, say, in another county, wrong, but also does not in any way interfere with the seizure by the sheriff, under the existing writ of fi. fa., of any goods within his bailiwick which are the goods of the defendant, and consequently fall within the direction in the writ of fi. fa. The seizure of the goods of a stranger may, of course, prevent the issue of a fresh writ or further proceedings under the existing writ in a case in which the sheriff interpleads, because in such a case there is either an express stay by the interpleader order or an implied stay by the pendency of the summons. The result is that, in our judgment, the judgment creditor in the present case had a right to serve the bankruptcy notice, for there was no stay, express or implied, and the sheriff had not realized anything by the seizure or by the sale of the goods of the debtor, for which he was bound to account or make a deduction from the judgment debt mentioned in the bankruptcy notice; nor was the sheriff in possession of the goods of the judgment debtor, nor had he ever been so. We think this appeal must be allowed, and the registrar's order must therefore be discharged, with costs, both here and below.

Appeal allowed.

Solicitors: *John Westcott; George Twynam.*

W. L. C.

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(1) 6 Taunt. 370.

[IN THE COURT OF APPEAL.]

C. A.
1902
June 3.

FLETCHER *v.* LONDON UNITED TRAMWAYS, LIMITED.

Employer and Workman—Compensation—Employment on Engineering Work—" Railroad"—Tramway—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A tramway laid along a public road is a "railroad" within the definition of engineering work in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and, therefore, employment on the construction, alteration, or repair of a tramway is an employment to which the Act applies.

Appeal from a decision of the judge of the Brentford County Court on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman in the respondents' employment. The respondents, who had obtained power under the Light Railways Act, 1896, to construct a light railway along the public road from Uxbridge to Hanwell, applied to the Light Railway Commissioners for an order for (inter alia) the construction of a light railway from Hanwell to Acton. The Commissioners refused the application on the ground that the proposal should be submitted to Parliament. This was accordingly done, and the London United Tramways Act, 1900 (63 & 64 Vict. c. cclxxi.), was passed, which, after reciting the application to the Light Railway Commissioners and their decision, authorized the construction of a tramway, to be worked by electrical power, along the road from Hanwell to Acton, forming a continuation of the authorized light railway from Uxbridge to Hanwell, which was laid like a tramway. The Act incorporated s. 3 and Parts II. and III. of the Tramways Act, 1870 (33 & 34 Vict. c. 78), and by s. 46 nothing in the Act was to exempt the company from the provisions of any general Act relating to tramways then in force or which might thereafter pass. By s. 34 the tramway in the Ealing urban district should, for the purposes only of purchase by the

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Ealing Urban District Council, be deemed to form part of the light railway to Uxbridge.

The applicant was employed by the respondents on the construction of the tramway between Hanwell and Acton, and while so employed was injured by an accident arising out of and in the course of his employment. The question raised was whether the employment of the applicant was on, in, or about a "railway" or "engineering work" within the meaning of s. 7 of the Workmen's Compensation Act, 1897. The county court judge held, first, that the tramway was not a railway within the meaning of s. 7; and, secondly, that it was not a railroad within the definition of engineering work in that section, the word "railroad" being synonymous with railway. He accordingly decided that the employment was not one to which the Act applied, and dismissed the application for compensation.

The applicant appealed.

Compston, for the applicant. The tramway, on the construction of which the applicant was employed, was a railroad within the definition of engineering work in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. That section speaks of employment on, or in, or about a railway or engineering work. By sub-s. 2 railway is defined as meaning the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and railway and railway company have the same meaning as in the Acts of 1873 and 1896. It is not now contended that a tramway is a railway within that definition. Sub-s. 2 also defines engineering work as meaning any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer. The word "railroad" is there used in a wider sense than railway. The Legislature purposely altered the word so as to include a larger area. There is no reason for saying, as the county court judge thought, that the word is synonymous with railway. Railroad is a term in common use in America, and the Century Dictionary defines it as a road upon which are laid one or more lines of rails to

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guide and facilitate the movement of vehicles designed to transport passengers or freight. A similar definition is given in Worcester's Dictionary. A tramway exactly comes within that definition. The Encyclopædia Britannica, title "Railway," says that railways had their origin in the tramways which were laid more than 200 years ago in the mineral districts of England for the conveyance of coal to the sea. A tramway is, therefore, properly described as a railroad, and the decision of the county court judge cannot be supported. [He referred to *Doughty* v. *Firbank*. (1)]

Ruegg, K.C., and *R. Pike Glasgow*, for the employers. A tramway is not a railroad within the definition of engineering work in s. 7, sub-s. 2, of the Act. Railway is defined in the sub-section by reference to the Regulation of Railways Act, 1873, which, by s. 3, defines the meaning of the term when used in that Act as including every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic. "Railway," therefore, in the Act is confined to a railway open for public traffic and subject to the provisions of the Railway Regulation Acts. The word "railroad" includes something more, and means anything that is called a railway in the popular sense of the term. It includes, for instance, a contractor's line laid down temporarily for the construction of a railway, as in *Doughty* v. *Firbank*. (1) It also includes a railway in course of construction, which is not covered by the definition of railway previously given. So, too, the word dock is inserted in the definition of engineering work, though a dock is included in the definition of factory in the section, for the purpose of including a dock in course of construction. A tramway which comes under the provisions of the Tramways Act, 1870, is not a railroad. The term tramway is a well-known term, signifying a specific thing, and if the Legislature had intended to bring the construction, alteration, or repair of a tramway within the definition of engineering work, it would have inserted the word tramway in the definition. It has not done so, and it must be taken as having intended to exclude a tramway. In *Fullick* v. *Evans, O'Donnell & Co.* (2)

(1) (1883) 10 Q. B. D. 358.

(2) (1901) 84 L. T. 413.

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A. L. Smith M.R. said that he could see no distinction between the words railway and railroad in s. 7. That was only a dictum, and no opinion upon the point was expressed by the other members of the Court, but it was a dictum strongly in support of the contention of the respondents.

Compston was not called upon to reply.

COLLINS M.R. I am of opinion that this appeal should be allowed. The applicant was employed on the construction of a part of a continuous line which comes under different statutory provisions at different parts of its length. One part of it is a light railway, and the rest is an electric tramway. The particular part of the system upon which the injured man was working was that part which was authorized as an electric tramway, and the county court judge held that, having regard to the definitions in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, the employment did not come within the Act. It was first of all suggested—though this contention was not urged before us—that the employment was on a "railway," which term is defined by s. 7, sub-s. 2, to mean "the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and 'railway' and 'railway company' have the same meaning as in the said Acts of 1873 and 1896."

The county court judge held that the part of the system where the applicant was working, not being a railway of any railway company to which the Regulation of Railways Act, 1873, applies, and not being a light railway made under the Light Railways Act, 1896, was outside the definition of "railway." I see no reason to differ from the learned judge upon that point. It was then contended that the employment of the applicant was on an "engineering work," a definition of which is also contained in s. 7, sub-s. 2, of the Act. That definition says that "engineering work means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The Legislature has here introduced a new word, "railroad," the word in the earlier part of the section being "railway." There is no vehement presumption that this Act, when it uses different words, always means the same thing. Indeed, I think the framers of the Act may be entitled to the presumption that when it uses different words different things are meant. The Act uses the word "railroad," and that word is certainly capable of expressing a tramway. If one carries one's mind back to older times, railroad was apparently the usual word to describe a road used as a tramway where horse power or some power other than steam was used; and it seems to me that "railroad" taken by itself is a good English word descriptive of what is now usually known as a tramway. That being so, why is it not, when used in this Act, to embrace a tramway upon which some work of construction, alteration, or repair is being done? A tramway can only be excluded by assuming that the Legislature must be taken to have meant by the word "railroad" the same thing as that which they had previously defined as "railway." I can see nothing whatever to ground that presumption. I can see nothing to rebut the natural inference that the word railroad was used as a term having a larger meaning than railway, being in fact the genus of which railway is a species. The Legislature, to my mind, intended to embrace something outside a railway proper, because in the first place, as I have already said, they used the word "railroad," and in the second place because they placed a railroad in the same category with harbour, dock, canal, and sewer. It seems to me that the presumption is that the Legislature intended to embrace a larger ambit than is embraced by the word railway.

The applicant here was employed on the construction of what in fact is a railroad. Therefore primâ facie the work upon which he was employed when he met with the accident came within the definition of engineering work, and I can find nothing in any other definition or in any other part of the Act to exclude him from the rights which the Act has conferred upon him, if his employment was on engineering work. For these reasons I think that the applicant is entitled to compensation.

MATHEW L.J. I am of the same opinion. Sect. 7, sub-s. 1, says that the employments to which the Act applies include, among other things, employment on, in, or about engineering work. Engineering work is defined in sub-s. 2 as meaning, so far as material, any work of construction of a railroad, harbour, dock, canal, or sewer. In my opinion the applicant was at the time of the accident employed on the construction of a railroad within the meaning of the section. The county court judge thought that he ought not to treat the word "railroad" as meaning anything more than the word "railway," as defined a little earlier in the same sub-section. I can see no reason for coming to that conclusion. If the word railroad alone were used in the definition, the argument might, perhaps, though I do not say it would, have more force in it; but this is a comprehensive enactment which defines engineering work and refers to railroad, harbour, dock, canal, and sewer, thus indicating that railroad is to receive a wide meaning. In my opinion, the construction placed upon the word railroad by the county court judge is too narrow. The appeal must, therefore, be allowed.

COZENS-HARDY L.J. I am of the same opinion. In this case we have the advantage of a full statement of the reasons on which the county court judge arrived at his decision. It amounts to this, that he thinks himself driven to hold that the word "railroad" in the definition of engineering work is identical with "railway," which is defined in the same section. I agree with the county court judge that a tramway is not a railway within the definition in the Act; but I can see no reason whatever for holding that when the Legislature changed the word from railway to railroad they did not intend to make any alteration in the meaning. I can see no reason for supposing that the Legislature did not intend to embrace a larger ambit. It has, however, been argued on behalf of the tramway company that, though that may be so, the true view is to hold

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that a railroad must be limited to the construction of that which, when completed, will be a railway within the definition in the same section. For that argument I can see no foundation. Engineering work includes not merely any work of construction, but also any work of alteration or repair of a railroad. It seems to me that railroad is used in this definition in the broad and popular sense, which would include a tramway such as the one on which the applicant was at work. The case of *Fullick* v. *Evans, O'Donnell & Co.* (1) seems to me in no way to conflict with the decision at which we are now arriving. The decision in that case only amounted to this—that a man employed in the erection of a signal-box on a railway which was being constructed was employed on the construction of a railroad, and therefore on engineering work within the meaning of this section. In the language of the present Master of the Rolls in that case, whether the word in the definition be railway or railroad, it would cover the case of a railway signal-box. For these reasons I think that the decision of the county court judge was wrong.

Appeal allowed.

Solicitor for appellant: *Walter Turner.*

Solicitors for respondents: *Hugh C. Godfray.*

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(1) 84 L. T. 413.

A. M.

C. A.
1902
June 9.

[IN THE COURT OF APPEAL.]

FRANCIS MORTON & CO., LIMITED *v.* WOODWARD.

Employer and Workman—Compensation—Review of Weekly Payment—Time from which Weekly Payment may be Ended, Diminished, or Increased—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *Sched. I., ss.* 1 (*b*), 12.

When an application to review a weekly payment made under the Workmen's Compensation Act, 1897, on the ground that the workman's incapacity has ceased, is brought before an arbitrator, he is not bound to treat the agreement for or award of a weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity had ceased when the application to review was made, or at any and what subsequent time before the hearing, and to make his award with reference to the date so determined.

Appeal from the decision of the judge of the county court of Liverpool on an application to review a weekly payment under an agreement between the employers and the workman.

The application was made by the employers under the following circumstances. The workman was in their employment as a riveter of boilers, and met with an accident in the month of May, 1901, by which he lost the sight of one eye. The employers paid the workman half his weekly wages until August 28 in the same year. They then agreed by letter to continue the payment in accordance with the provisions of the Workmen's Compensation Act, and this letter was incorporated in a memorandum of agreement duly recorded in the county court on September 13. On September 2 the workman was examined by Dr. Stephenson, a medical man appointed on behalf of the employers, who certified that in his opinion the workman had completely recovered from the accident, and was able to resume his former duties. The employers continued to pay compensation under the agreement up to the 11th of November following, and on the 12th of that month they filed a notice in the county court requesting an arbitration with respect to the review and termination of the weekly payment. The case was heard on December 13; the certificate of Dr. Stephenson was produced; but on the workman stating that he had not been previously informed of the contents of the certificate, and that he was dissatisfied with it, the judge directed a reference to Dr. Shears, one of the medical referees. The reference stated that the matter on which the judge was satisfied that it was desirable to obtain a report was, "Whether the said John William Woodward has now fully recovered from the effects of the accident, and is quite fit for work and able to follow his employment," and that this matter was material with respect to the review and termination of the weekly payments. Dr. Shears, one of the medical referees, was therefore appointed to examine the workman and report to the judge on the matter so stated. The certificate of Dr. Stephenson was appended. The report of Dr. Shears, which was made in the following January, was: "John William Woodward's remaining right eye has good sight and is free from disease. In my opinion a one-eyed man runs a slight additional risk to this eye in a dangerous occupation such as that of a boiler-maker; if, however, the parties concerned have decided to incur this slight risk, I see no reason why J. W. Woodward should not at once return to his former occupation. I am of opinion that for some weeks J. W. Woodward will not be restored to his full earning capacity, and for the following reason. Owing to the loss of one eye he will have difficulty in correctly judging of the distance of objects. This would particularly apply to the striking of a rivet with a hammer; but with practice this awkwardness will disappear, and he will learn to correctly judge of distances with his one eye. As a one-eyed man he would probably experience more difficulty in obtaining work from new employers."

The case came on again for hearing on April 11, 1902, and on argument as to the date from which diminution of the weekly payment should take place, the judge held that it should date from the then present time. Being asked to find as a fact when the incapacity ceased, the judge held that it ceased at the date of Dr. Stephenson's report on September 2, 1901. The award was as follows: "I find that the respondent John William Woodward has been since the 2nd day of September last, and now is, able to earn the same amount of wages as he had earned previously to the application for arbitration herein, and I order that the weekly payment of 18*s.* 3*d.* payable to the respondent under the agreement of 28th August, 1901 . . . . be diminished to the weekly sum of one penny as and from the 16th day of April instant; but this award is made without prejudice to the rights and remedies of the respondent under the said agreement for the arrears of the weekly payments up to the 16th day of April instant inclusive."

The applicants appealed.

Ruegg, K.C., and *Leslie F. Scott*, for the applicants. The agreement was to continue the compensation according to the provisions of the Act, that is—under s. 1 (*b*) of Sched. I.—during total or partial incapacity, and the judge was wrong in concluding that he could only end the agreement as from the date of the hearing. He found that the incapacity ended on September 2; but it may be that if no intimation was given to the workman the compensation could only be ended from the date of the application to the county court. The question for arbitration was whether at that date the incapacity had ceased, and all subsequent proceedings relate to that time; otherwise the employers would have to pay merely because of the delay in the hearing of the case. There is nothing in s. 12 of Sched. I. which obliges the Court to enlarge the time for payment until the hearing of the application.

Bankes, K.C., and *W. Greaves Lord*, for the respondent. The report of the medical referee is conclusive as to the condition of the workman, and it shews that in January the workman had not lost his incapacity for work. There was no evidence before the judge on which he could find that the incapacity ceased on September 2, for the reference to the medical referee was made because the medical evidence before the judge at the first hearing was insufficient. The agreement was ended by the award of the judge on the second hearing, and must have had full force and effect up to that date.

COLLINS M.R. In this case there is an appeal by employers against an award of a county court judge. What happened to give rise to the litigation was that a workman, while in the course of his employment as a riveter engaged in boiler-making, met with an accident by which he lost the sight of one eye. An agreement was come to fixing the amount of compensation by way of a weekly payment to which the workman was to be entitled, and this agreement was registered under the provisions of the statute. There came a time when the employers contended that the workman was fully restored to his capacity for earning wages. The workman did not agree in this view, and in November of the same year an application was made by the employers under s. 12 of Sched. I. of the Workmen's Compensation Act, 1897, for a review of the weekly payment with a view of putting an end to it. At the hearing in the county court, which took place in December, it appeared that the workman had in the previous September submitted to a medical examination at the instance of the employers; but it also appeared that the result of the examination had not been communicated to the workman. It was read to him by the county court judge, and he expressed himself to be dissatisfied with it, and the judge, following the course laid down in the Act, submitted the matter to a medical referee for report. The terms of the reference were that the medical referee should report "whether the said John William Woodward has now fully recovered from the effects of the accident, and is quite fit for work and able to follow his employment," and the judge appended to the reference a statement of the medical evidence given in the form of a certificate by the medical man who examined the workman on the previous September. For some reason the report was not made until January 2 in the following year, when a certificate was made pointing out certain lingering drawbacks to the full capacity of the workman in the class of work that he was used to. The hearing did not come on till April, and then the judge arrived at the conclusion which he has embodied in the award which gives rise to the question before us. He found that the workman had been since September 2, and then was, able to earn the same amount of wages as he had earned previously to the application for arbitration; but he ordered that the weekly payment should be reduced to a nominal sum from April 16, and stated that the award was made without prejudice to the rights and remedies of the workman as to arrears up to that date. Therefore he has found as a fact that the man was not incapacitated from September 2, and that he was not incapacitated at the date of the hearing, and he saved the parties their rights intact as to the obligation of the employers to pay, and the right of the workman to insist on being paid, compensation, and contented himself with simply from and after the date of his order of April 16 reducing the compensation to a nominal sum.

It has been urged before us, and it seems to be clear from the note, that the judge was of opinion that he had no right to deal with the question at what date, if at all, the workman's incapacity had ceased before the ultimate hearing of the case. If that is so, the learned judge was wrong in saying that he had no jurisdiction to deal with this matter, because the dispute which arose when the matter was first initiated before the Court was as to whether the workman at that time was subject to any incapacity for carrying on his work. That dispute was distinctly formulated, and the Court could not escape from the obligation of deciding that issue by reason of the interval that had elapsed. It may have become more difficult to decide, but it was still there. The certificate of the medical referee was, therefore, not necessarily conclusive as to the condition of the workman at the previous date. The scheme of the Act is that compensation is to be given during the period of incapacity—that is, incapacity of the workman to earn his wages. Therefore, when a dispute arose as to the man's incapacity for work, the essential question was his condition, not when the Court was able to give its attention to the matter, but when the dispute was formulated as to whether the man's incapacity had ceased or not. That was clearly formulated when the proceedings were commenced, and it seems to me the learned judge has not addressed his mind to that question, and also it seems to me that he has not decided that the incapacity continued until the date of the ultimate hearing. He has himself clearly shewn that he did not regard these as matters to which he was justified in addressing his mind. I have shewn that the evidence given at the first hearing cannot, according to his own record,

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be taken as conclusive; and if it is not conclusive, how are we to know, and how is he to know, at what date the incapacity ceased? While he has said that it ceased at the date of the first certificate, he has himself simultaneously affirmed that the medical evidence was insufficient. It was, however, the only evidence on which he could find that at that date the incapacity had ended. It follows that neither side was right in their contention, and that it still remains to be decided at what date the workman's incapacity ended, and that the learned judge must hear the evidence that is tendered on that point. The case must, therefore, if the parties desire it, go back for the decision of this question. The employers have succeeded on the only point on which they desired to appeal, namely, the question whether the judge was concluded by the lapse of time which occurred before the case came on from inquiring what was the condition of the workman when the dispute was formulated, and framing his award accordingly. It seems to me, therefore, that the appeal must, to the extent that I have stated, be allowed.

Mathew L.J. I am of the same opinion. The delay that has taken place in the hearing of the case ought not to prejudice either side, and according to the judgment of the learned county court judge it does prejudice the employers, as they are treated as liable up to the date of the final decision.

Now, what is the question? The question on the face of these proceedings for the Court is whether, when they were initiated in November, this man's incapacity had ceased. The question came before the county court judge, and he found there was a controversy on the point, and he decided to take the opinion of the medical referee. The medical referee had not the question referred to him which the learned county court judge had to dispose of, but the question referred to him was only what the condition of the man then was. He says that at the date of his report the man's incapacity had been diminished, but not entirely got rid of. The question then went back to the learned county court judge, who had still to determine at what date the incapacity ceased altogether, or at

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what date it was substantially diminished, so that there ought to be a reduction in the amount of the allowance. It was proposed by learned counsel to go into that question. The applicant was called, and the question put to him, "Are you now capable of working?" and objection was made to the question being answered on the ground that the medical referee's certificate was conclusive evidence. It is not conclusive evidence on the point before the learned judge for his consideration. That being so, he was wrong in considering that he had no jurisdiction to decide the point.

The case must go back for him to say at what date the incapacity ceased.

Cozens-Hardy L.J. I agree. I think it is reasonably clear that the matter which was referred to the learned county court judge, and which he was competent to deal with, was whether at the date of the initiation of these proceedings the incapacity to work had ceased. That was an issue upon which the learned judge was bound to hear evidence. One particular piece of evidence which he had was conclusive, but only conclusive as to the condition of the man on January 2. That may throw, and must throw, some light on his condition at the earlier date; but as I read the Act, there is nothing whatever to make that certificate the sole admissible evidence as to the condition of the man at an antecedent date, or even at the subsequent date when the matter comes on for decision.

Speaking for myself, I greatly doubt whether the doctor's certificate when fairly read does amount to a certificate that the workman's incapacity had ceased on January 2; but I need not decide that. All I need decide is that the learned county court judge had jurisdiction, if he thought fit, to review the payment to the applicant as from the date of the application.

Appeal allowed.

Solicitors for applicants: *William Hurd & Son, for Oliver Jones, Billson & Co., Liverpool.*

Solicitors for respondent: *Helder, Roberts & Co., for H. F. Neale, Liverpool.*

A. M.

THE KING *v.* THE JUDGE OF THE BIRMINGHAM COUNTY COURT AND ANOTHER.

1902
June 23.

County Court—Jurisdiction—Application for Judgment Summons—Existing Committal Order against Co-defendant — County Court Rules, 1889, *Order* XXV.

In a county court action against three defendants upon a joint and several promissory note, judgment was given against all the defendants jointly. Upon default in payment of the judgment debt a judgment summons was issued against all three defendants, but service could only be effected on one, against whom a committal order was made but suspended on payment of certain monthly instalments. Application was subsequently made for leave to issue a judgment summons against one of the other defendants, but was refused by the county court judge on the ground that he had no jurisdiction to give leave to issue a judgment summons against one joint debtor while a committal order was still in existence against his co-defendant, to which no return had been made:—

Held, that the county court judge had jurisdiction to allow the summons to issue, and that a mandamus must issue to him to determine the application for leave upon the merits.

RULE NISI for a mandamus commanding the judge of the Birmingham County Court, or alternatively the registrar of that court, to hear and determine an application by the Birmingham Industrial Land and Deposit Company, Limited, for leave to issue a judgment summons against one Dryhurst. The facts were as follows.

An action had been brought in the Birmingham County Court by the applicants against three persons, named Dryhurst, Simcox, and Price, upon a joint and several promissory note for 7*l.*, of which they were the makers; judgment was recovered against the three defendants jointly, and the amount was ordered to be paid by instalments of 10*s.* 6*d.* a month. The instalments fell into arrear, and in December, 1901, there was a default in payment to the amount of 2*l.* 12*s.* 6*d.* (five instalments); on December 11, 1901, a single judgment summons was issued against all the three defendants. At the hearing on January 24, 1902, it appeared that the summons had only been served on Price, it having been impossible to effect service on the other two defendants, and a committal order was made against Price for 2*l.* 12*s.* 6*d.* and costs; but the issue of the warrant was suspended on payment of instalments of 4*s.* a month. Shortly afterwards the address of Dryhurst was ascertained, and on February 3 the plaintiff applied to the registrar for leave to issue a judgment summons against him, which was refused. Upon appeal the registrar's decision was affirmed by the county court judge upon the ground that proceedings by way of committal order were in the nature of an unexecuted execution, and that a second execution could not issue until there had been a return to the first; and that he had therefore no jurisdiction to give leave for the issue of a judgment summons.

Bonsey, for the county court judge, shewed cause. There was no jurisdiction to issue the judgment summons. The procedure by way of judgment summons is in the nature of an execution, and the analogy of an execution under a writ of fi. fa. applies. No doubt there might have been separate judgments against each defendant, but the plaintiffs elected to take a joint judgment against all three; and proceedings having been taken to enforce the joint judgment by a joint execution, there can be no further execution for the same debt until a return has been made to the first execution. No return can be made till either the last instalment has been paid by Price, when the judgment debt will have been extinguished, or until Price has made default and has been arrested under the committal order. The execution must follow the judgment: *Clarke* v. *Clement* (1); and the case cannot be treated as though there were separate judgments against the three defendants with a right to separate executions.

Cracroft, for the applicants, in support of the rule. The plaintiffs have made no election. In execution, election means an election of remedies, or of the order of remedies; there is no election when execution is issued against one of two joint defendants. The county court judge has in effect misapplied the principle of law laid down in *Kendall* v. *Hamilton* (2), that recovery of judgment against one of several joint contractors

(1) (1796) 6 T. R. 525.

(2) (1879) 4 App. Cas. 504.

is a bar to an action against the rest. It is clear that under the old process the arrest of one joint defendant upon a writ of ca. sa. did not operate as a discharge of a joint debtor: see Chitty's Practice, p. 901 (ed. 1885). The County Court Rules do not provide any special provisions as to the issue of judgment summonses in the case of a joint judgment, but execution in some form against each of the defendants is a matter of right; the plaintiffs are entitled to it ex debito justitiæ, and they are entitled to the same class of remedy against each defendant. The rule as to the necessity for a return to a writ of fi. fa. before issue of further process of execution is merely for the protection of the sheriff.

LORD ALVERSTONE C.J. I am of opinion that this rule should be made absolute, and that the plaintiff is entitled to have his application for leave to issue a judgment summons against Dryhurst considered on the merits. For some purposes, no doubt, a committal order is in the nature of an execution; it is a procedure for obtaining payment of a debt, and may be described as a modified form of the old writ of ca. sa. In the present case there were three defendants, and to a certain extent the difficulty has arisen from the plaintiff having in the first instance taken a committal order against one defendant only; if the analogy of a writ of fi. fa. applies to such a case, there has been no return and there can be no further execution. I think, however, that the analogy does not apply. The jurisdiction by means of a committal order is a new class of jurisdiction; the county court judge has to consider the means of the judgment debtor, the instalments paid under the order are paid into court, and the judge has the opportunity of knowing how much of the judgment debt has been received on behalf of the judgment creditor. I think the contention on behalf of the judgment creditor is right, that unless there is a rule of law which prevents his having a remedy against the other two defendants, or unless he is prevented from enforcing his remedy by his own conduct, he ought to have such a remedy. It is impossible, however, for us to go so far as to say that the judge must issue and hear a judgment

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summons; it might be, for instance, that a very large proportion of the judgment debt had been paid into court, and in such a case it would be quite wrong to say that the judge had no discretion as to whether a judgment summons should issue. It must be open to the county court judge to have before him the same kind of information as that which is required when leave is asked to issue a judgment summons for service out of the district or where leave is necessary, because the application is made after the time limited by Order xxv., r. 15, of the County Court Rules; and, therefore, I think that the county court judge, before allowing the summons to issue, is entitled to satisfy himself as to the actual state of the facts. The rule must be made absolute to hear and determine the application for leave to issue this judgment summons; upon the hearing of the application the judge can require such information to be supplied to him as he may think proper. I am clearly of opinion that in holding that he had no jurisdiction to hear the application at all, the county court judge went too far.

DARLING J. and CHANNELL J. concurred.

Rule absolute.

Solicitors for judgment creditor: *Arnould & Son, for Bickley & Lynex, Birmingham.*

Solicitors for county court judge: *Solicitor to the Treasury.*

W. J. B.

PASQUIER *v.* NEALE.

1902
June 25.

Licensing Acts—Offences—Sale of Wine without Licence—Unlicensed Restaurant —Refreshment Houses and Wine Licences Act, 1860 (23 *&* 24 *Vict. c.* 27), *s.* 19.

The keeper of a restaurant, carrying on business in premises not licensed for the sale of intoxicating liquors, was also a partner in a wine dealer's business carried on upon duly licensed premises in the neighbourhood. A customer, taking a meal in the restaurant, ordered a pint of claret from a waiter and gave him the money for it; the waiter went to the licensed premises, and there bought and paid for a pint bottle of claret which he brought back to the restaurant, where the customer consumed it. Upon the hearing of a summons against the keeper of the restaurant for selling wine without a licence, a magistrate found that there had been a sale at the restaurant of the wine by the defendant's waiter to the customer, and convicted the defendant:—

Held, that there was evidence upon which the magistrate might properly hold that the sale was at the restaurant, and that the conviction was right.

Case stated by a metropolitan police magistrate upon an appeal against a conviction upon a summons under s. 19 of the Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), charging the appellant with selling wine by retail without having a proper licence in force duly authorizing him in that behalf. (1)

The appellant was a restaurant keeper carrying on business at 16, Gerrard Street, Soho, which premises were not licensed for the sale of intoxicating liquors. He also carried on the business of a wine dealer in partnership with one Paul Durand at 2, Dansey Yard, Soho, in respect of which Durand held a licence as a dealer in foreign wine under 6 Geo. 4, c. 81, s. 2. On December 10, 1901, an excise officer named Finnigan entered the restaurant at 16, Gerrard Street, and ordered a meal. The appellant's waiter shewed him a list of wines and prices, and Finnigan selected a pint bottle of claret at eighteen

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(1) By s. 19 of the Refreshment Houses and Wine Licences Act, 1860, an excise penalty of 20*l*. is imposed upon any person selling wine by retail, whether to be consumed on the premises or not, without having a proper licence in force duly authorizing him in that behalf, over and above any other penalty to which he may be liable.

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pence. The waiter asked Finnigan to pay for the wine, and Finnigan gave him the sum of eighteen pence. Thereupon the waiter left the premises at 16, Gerrard Street, and went to 2, Dansey Yard, which latter premises were only a short distance away, and there purchased a pint bottle of claret for which he paid, though there was no evidence as to the price. He returned to 16, Gerrard Street with the pint bottle of claret, which he served to Finnigan, who consumed it. On the facts the magistrate held that there had been a sale of wine to Finnigan by the appellant's servant at 16, Gerrard Street, and convicted and fined the appellant.

The question for the opinion of the Court was whether upon the facts there was evidence on which the magistrate was justified in finding that there was a sale of wine to Finnigan on the premises 16, Gerrard Street, or whether, as contended by the appellant, he was bound as a matter of law to find that the sale took place at 2, Dansey Yard.

Avory, *K.C.*, (*Woodcock* with him), for the appellant. The facts stated in the case are conclusive that the waiter purchased the wine at Dansey Yard, for it is distinctly stated that he paid for it there; this is inconsistent with his having obtained it as the appellant's servant by means of the ordinary waiter's check, and then sold it to the customer at Gerrard Street. The necessary inference from the facts is that the waiter bought the wine as the servant or agent of the customer. It makes no difference that the proprietor of the restaurant was in partnership with the proprietor of the wine business.

[LORD ALVERSTONE C.J. It is not immaterial, for it is the restaurant proprietor's own wine which is being sold. But the only question is whether there was evidence on which the magistrate could find a sale at Gerrard Street.]

The wine was appropriated at Dansey Yard; no particular bottle of claret was chosen at Gerrard Street. The decisions in *Pletts* v. *Campbell* (1) and *Pletts* v. *Beattie* (2) shew that, where an order is sent to licensed premises and the goods are there appropriated to the purchaser, the sale is at the licensed

(1) [1895] 2 Q. B. 229.

(2) [1896] 1 Q. B. 519.

premises and not at the customer's house, as would be the case where there is no appropriation; the decision in the latter case is conclusive in the appellant's favour.

[LORD ALVERSTONE C.J. No doubt the waiter may have acted as the agent of the customer; but can we say that he must have done so?]

Yes; that is the only and necessary inference from the finding of the facts as to the purchase of the wine.

[CHANNELL J. Do not the facts shew a course of business by which the wine dealer at Dansey Yard was enabled to sell his wines at Gerrard Street without a licence?]

No; even if the appellant had been the sole proprietor of the wine business, the facts would be on all fours with those in *Stephenson* v. *Rogers* (1), and the appropriation would be on the licensed premises.

Sir Edward Carson, K.C., S.-G., (*Rowlatt* with him), for the respondent. The contention for the appellant involves the proposition that the holder of a wine licence can carry on the business next door of a refreshment-house keeper without a proper licence; such a contention cannot be supported. The present case is perfectly clear; there was ample evidence to justify the inference drawn by the magistrate.

[He was stopped by the Court.]

LORD ALVERSTONE C.J. In this case the learned magistrate has drawn the inference of fact that there had been a sale of the wine to Finnigan by the appellant's servant at 16, Gerrard Street, and the only question for us is whether there was any evidence to justify the inference so drawn. It is impossible for us to say that a magistrate is not at liberty to draw inferences of fact unless they can be conclusively proved to be true inferences. Was there not ample evidence here on which the particular inference could properly be drawn? On one side it is said boldly that the appellant's servant, in procuring the wine, was acting as the agent of the customer; while on the other side it is contended that a man, who has a licence to sell wine at one particular place, by keeping a restaurant without a

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(1) (1899) 80 L. T. 193.

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wine licence at another place promotes very effectively the sale of his own wines. It is obvious that, if it is proved that the waiter is buying for the customer, the charge of selling wine without a licence cannot be supported; nothing could be simpler. But it is said that the magistrate must necessarily take that view of the facts; and I cannot assent to that contention. It is impossible to say that there was no evidence to support the view which the magistrate took.

DARLING J. and CHANNELL J. concurred.

Appeal dismissed.

Solicitors for appellant: *Watkins, Baylis & Chidson.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. J. B.

1902
June 13.

In re HOWES.
Ex parte WHITE.

Bankruptcy—Fraudulent Debtor—Prosecution by Trustee—Costs of Prosecution—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-s.* 3; *ss.* 16, 17*—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 57, *sub-s.* 3; *s.* 166.

A trustee who prosecutes a debtor for offences committed against the bankruptcy laws without first obtaining an order of the Court for that purpose under s. 16 of the Debtors Act, 1869, will not, as a general rule, be allowed the costs of the prosecution out of the estate, even although the prosecution was expressly sanctioned by the committee of inspection.

THIS was an application for an order for the taxation and payment of the costs of the prosecution of the debtor under the Debtors Act, 1869.

On January 14, 1902, a receiving order was made against the debtor, adjudication followed, and a Mr. White became the trustee in the bankruptcy with a committee of inspection.

On March 24 the trustee reported to the committee that the debtor had committed offences against the bankruptcy laws by removing his goods without disclosing them. Thereupon the committee authorized him to prosecute the debtor and to employ Messrs. Adams & Adams as his solicitors for the purpose. Under counsel's advice the debtor was arrested and charged with having committed an offence under sub-s. 3 of s. 11 of the Debtors Act, 1869, upon which he was committed for trial. Ultimately he was acquitted, the jury stating, however, that they gave him the benefit of a doubt. Messrs. Adams & Adams' bill of costs in the matter was 60*l.*, of which 18*l.* was for out of pocket expenses.

The taxing master having declined to tax the bill on the ground that no order to prosecute had been obtained under s. 16 of the Debtors Act, 1869, the trustee now applied for an order that the costs might be taxed and paid out of the estate.

Muir Mackenzie, for the application. This is a meritorious case. Although the debtor had the good fortune to be acquitted, yet the prosecution resulted in considerable property being recovered for the estate. No doubt s. 166 of the Bankruptcy Act provides that when the Court orders a prosecution for any offence under the Debtors Act, 1869, it is the duty of the public prosecutor to take the case up, and in that case the estate would under s. 17 of the Debtors Act be relieved from the costs of the prosecution. But there is nothing in the Bankruptcy Act which prohibits the trustee from himself undertaking the prosecution. Not unfrequently the public prosecutor declines to prosecute, and in such a case it would be undesirable that the creditors should be debarred from themselves prosecuting and charging the estate with the costs. There is nothing in the Bankruptcy Act which makes it incumbent upon the trustee in all cases to obtain the assistance of the Treasury, and sub-s. 3 of s. 57 is sufficiently wide to entitle a committee of inspection to charge the assets with any proceedings or business requiring the employment of solicitors. In *In re Stanlake & Son* (1), where an order to prosecute was refused and the trustee prosecuted, an order was subsequently made after prosecution nunc pro tunc.

WRIGHT J. I see no ground for making the order that is asked for. It will saddle the estate with costs which, if the

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(1) (1878) 10 Ch. D. 774.

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trustee had done his duty and had obtained the leave of the Court under s. 16 of the Debtors Act, 1869, would have been paid by the Treasury. It seems to me that under sub-s. 3 of s. 57 of the Bankruptcy Act, 1883, the committee of inspection had no power to authorize the prosecution of the debtor without the sanction of the Court. *In re Stanlake & Son* (1) was a very different case to this. In my judgment it is highly undesirable that a trustee should, without obtaining an order of the Court under s. 16 of the Debtors Act, 1869, be entitled to embark upon a speculative prosecution of the debtor.

Solicitors: *Adams & Adams.*

H. L. F.

C. A.
1902
June 5.

[IN THE COURT OF APPEAL.]

DUNHAM *v.* CLARE.

Employer and Workman—Workmen's Compensation—Death resulting from the Injury—Natural or probable Consequence—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 1; *Sched. I., clause* 1 (*a*).

Where a workman receives personal injury from an accident arising out of and in the course of his employment and death ensues, the death may be the result of the injury within the meaning of Sched. I., clause 1 (*a*), of the Workmen's Compensation Act, 1897, even though in fact it may not be the natural or probable consequence thereof.

APPEAL from a decision of the judge of the Walsall County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a labourer who was injured by an accident while in the employment of the respondent. The deceased man was employed in a factory, and on September 2, 1901, he was carrying some heavy pipes when one of them slipped and fell on his foot, inflicting a wound on the toe. He attended hospital as an out-patient until September 17, when phlegmonous erysipelas supervened in the wound, and on September 27 he died. The doctor who attended him stated that the cause of death was blood-poisoning caused by erysipelas in the wound. The medical evidence was to the effect that erysipelas was a very unusual consequence of a wound of this kind, that according to modern theory erysipelas was caused by the introduction of a germ, that erysipelas would set in within about six days after the introduction of the germ, and that if erysipelas did not supervene until fifteen days after the date of the accident the wound had probably been reopened, this being possibly caused by the deceased walking to and from the hospital.

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(1) 10 Ch. D. 774.

It was contended on behalf of the respondent that death was not the result of the injury, but of some extraneous cause, and that, therefore, the applicant was not entitled to compensation. The county court judge held that the applicant was not entitled to compensation upon the ground that death was not the result of the injury, i.e., that it was not the natural or probable consequence thereof. The applicant appealed.

Ruegg, *K.C.*, and *R. J. Lawrence*, for the applicant. The county court judge applied the wrong test when he held that the death must be the natural or probable consequence of the injury. By s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, the employer is liable to pay compensation where personal injury by accident arising out of and in the course of his employment is caused to a workman; and by Sched. I., clause 1, the amount of compensation is regulated according as death or incapacity for work "results from the injury." To bring a case within the Act, death need not be the probable or natural consequence of the injury. It is sufficient if it results from the injury. Even if the erysipelas was caused by a germ which got into the wound some days after the accident, that would not prevent the death being the result of the injury. It would not amount to a fresh accident or a fresh injury resulting in death. It was suggested by the medical evidence that the wound might have been reopened by the deceased man walking to and from the hospital, and that the germ thus got in. But even if that were so, the respondent would not be relieved from liability. Assuming that the deceased man neglected the wound or continued to go about his usual course of life, death would still have been the result of the injury: *Reg.* v. *Flynn* (1); 1 Hale's Pleas of the Crown, p. 428. The consequences of an accident to a man who has bad health or some physical infirmity may be much more serious than to a man in sound health, and yet in both cases the injury is the result of the accident: *Lloyd* v. *Sugg & Co.* (2) The county court judge was, therefore, wrong.

[They also referred to *Thompson* v. *Ashington Coal Co.* (3)]

Disturnal, for the employer. This is a question of fact, and the county court judge upon a proper direction to himself has found that death did not result from the injury. The medical evidence shewed that the wound must have been reopened by some act of the deceased man and the germ of erysipelas introduced. Death did not result from the original wound, but from some extraneous matter introduced subsequently. Death must be the natural or probable result of the injury. The liability of the employer cannot be put higher than a liability arising from a tort. In such a case the natural or probable consequence can alone be looked at: *Sharp* v. *Powell* (4); *Clark* v. *Chambers* (5); 1 Hale's Pleas of the Crown, p. 428. Secondly, the liability of an employer under the Workmen's Compensation Act, 1897, is a liability as an insurer of his workmen in certain events against injury by accident. In marine insurance the liability depends upon what is the proximate cause of the loss: *Pink* v. *Fleming.* (6) That rule of marine insurance law has been applied to accident insurance: *Winspear* v. *Accident Insurance Co.* (7); and is applicable to all kinds of contracts of insurance. The doctrine of the criminal law as to murder or manslaughter, of which the case of *Reg.* v. *Flynn* (1) is an illustration, and the doctrine of liability for a tort, ought not to be extended to a case where an employer is made liable to compensate his workmen for injury

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(1) (1868) 16 W. R. 319.

(2) [1900] 1 Q. B. 481.

(3) (1901) 84 L. T. 412.

(4) (1872) L. R. 7 C. P. 253.

(5) (1878) 3 Q. B. D. 327.

(6) (1890) 25 Q. B. D. 396.

(7) (1880) 6 Q. B. D. 42.

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by accident, though the employer is a perfectly innocent party. The proximate cause of death ought only to be looked at. That cause was the introduction into the wound, at a subsequent date, of a germ which caused erysipelas. The employer, therefore, is not liable to pay compensation.

Ruegg, K.C., was not called upon to reply.

Collins M.R. In my opinion, this appeal should be allowed. The learned county court judge tells us in his judgment the grounds of his decision. He found and awarded that the applicant was not entitled to compensation on the ground that death was not the result of the accident, i.e., was not the natural or probable consequence. We have to determine whether that is not a misdirection to himself. The circumstances of the case are these. The deceased man admittedly met with an accident arising out of and in the course of his employment, which caused a wound to his toe. He was treated for that wound at the hospital as an out-patient. After a certain interval erysipelas set in, and he died of blood-poisoning caused by the erysipelas. I will take it that at the time of the accident it seemed improbable, and it may even be unnatural, that erysipelas should supervene and that death should ensue. But the question we have to determine is whether that is the right standard to apply in ascertaining whether there is a liability to pay compensation under the Workmen's Compensation Act, 1897. That liability is created by s. 1, sub-s. 1, of the Act, which provides that, if in any employment to which the Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the 1st schedule to the Act. Turning to the 1st schedule, I find that clause 1 prescribes the amount of compensation where death or incapacity "results from the injury." That is the provision which regulates the amount of the compensation. The applicant for compensation, therefore, has to shew an accident causing injury, and death or incapacity resulting from the injury. In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a novus actus interveniens, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences. In dealing with an obligation created by the Act, we are not dealing with a case of contract or tort or with a liability of a criminal nature. In the case of contract, a person who commits a breach of it is liable for the consequences which naturally follow from the breach. So, too, in cases of tort, when the question arises whether a person is liable in respect of a breach of some duty imposed upon him, he probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty. That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The Act has imposed the liability irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, Did the death or incapacity in fact result from the injury? The county court judge, by inquiring whether death was the natural or probable consequence of the injury, has applied the wrong standard to the solution of the question. It is quite consistent to say that death resulted from the injury and yet that it was neither the natural nor the probable consequence of it. If no new cause, no novus actus, intervenes, death has in fact resulted from the injury. The case must, therefore, go back to the county court judge.

MATHEW L.J. I am of the same opinion. The employer says that death was not the result of the injury received from the accident, but was due to an entirely independent cause. It is said that the deceased man behaved unreasonably after

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the accident and aggravated the consequences, and thus brought on the erysipelas. Even if that were sufficient answer, as to which I express no opinion, I cannot say that his conduct was unreasonable considering the knowledge that was within his reach. The proposition has not been made out. I quite agree with the Master of the Rolls that the county court judge misdirected himself in laying down the wrong test, because death may have been the result of the injury though it was not the natural or probable consequence thereof.

COZENS-HARDY L.J. I am of the same opinion. In my opinion, the county court judge misdirected himself. A doctor who saw the wound on the day of the accident might have come to the conclusion that erysipelas was most unlikely to supervene, but the same doctor might subsequently have said that he was satisfied that death was the result of the injury. The question is, From what in fact has death resulted? The answer to that question does not depend upon what was at first thought to be reasonable and probable. If death has resulted in fact from the injury, the applicant is entitled to succeed.

Appeal allowed.

Solicitors for applicant: *Rowcliffes, Rawle & Co., for J. F. Addison, Walsall.*

Solicitors for employer: *Robinson & Bradley, for C. A. Loxton & Newman, Walsall.*

A. M.

1902
June 19.

HUDSON, Appellant *v.* GRIBBLE (Surveyor of Taxes), Respondent.

Revenue—Income Tax—Salary—Deductions—Contribution to Thrift Fund—Sum Payable or Chargeable by virtue of Act of Parliament—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146—*Manchester Corporation Act,* 1891 (54 *&* 55 *Vict. c. ccvii.*).

By the Manchester Corporation Act, 1891, the Manchester Corporation were empowered to establish a fund for the encouragement of thrift among the officers and servants of the corporation, and to make certain proportionate contributions towards the fund. By a scheme approved by the corporation under the Act, it was provided that persons entering the service of the corporation after the date of the Act should contribute to the fund a certain percentage of their salaries, to be deducted from time to time by the corporation from the salaries, and that no such person should cease to contribute to the fund while in the service of the corporation; and it was further provided that any person who at the date of the Act was in the service of the corporation might, by an application in writing, be admitted to the benefit of the fund, and become and continue to be a contributor to it upon the same terms and conditions as if he had entered their service since that date. The appellant, who was in the service of the corporation at that date, applied in writing to be admitted to the benefits of the fund, and became and continued to be a contributor to the fund of a certain proportion of his salary. He claimed to deduct this sum, from the amount on which he was assessed to income tax under Sched. E, by virtue of the first rule of s. 146 of the Income Tax Act, 1842, by which duty is payable on salaries, &c., "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament":—

Held, that the amount contributed by the appellant to the fund was not payable by virtue of any Act of Parliament, but by virtue of the scheme and of the appellant's application to be admitted to the benefits thereof, and, therefore, that he was not entitled to the deduction claimed.

Beaumont v. *Bowers,* [1900] 2 Q. B. 204, distinguished.

Case stated by Commissioners of Income Tax.

By s. 5 of the Manchester Corporation Act, 1891 (54 & 55 Vict. c. ccvii.), the mayor, aldermen, and citizens of the city of Manchester were empowered to establish a fund for the encouragement of thrift amongst the officers and servants of the corporation, and with a view of providing a sum of money which, in the event of the retirement or death of any person in the service of the corporation who had contributed to the fund, should be available for himself or his representatives—such fund to be called the "Thrift Fund"—and to prepare and approve by resolution a scheme for the establishment of such fund.

By s. 7 of the Act it was required that any scheme prepared by the corporation for the establishment of the Thrift Fund under the Act should contain the following provisions:—

"Any contributing member retiring bonâ fide from the service of the corporation of his own accord before attaining the age prescribed by the scheme, and not to escape dismissal for fraud, dishonesty, or misconduct involving pecuniary loss to the corporation, or leaving the service of the corporation in consequence of reductions or alterations in the establishment, or from his services being discontinued . . . . shall be entitled to receive back the whole amount of his own contributions with such interest as shall have accrued thereon under the scheme."

By s. 9 it was required that the corporation should, at the end of each half-year after the establishment of the Thrift Fund, contribute thereto, out of the rate or revenue upon which the salary or wages of each contributing member was or were chargeable, a sum equal to one-third of the sum which during the same half-year had been contributed thereto by such contributing member.

By s. 12 the corporation was not to be bound to recognise any assignment or trust relating to any contributions of any contributing member of the Thrift Fund.

On August 3, 1892, the corporation, by a resolution of the council, approved and adopted a scheme for the establishment of, and did thereby establish, the Thrift Fund.

The first article of the scheme provided that any person entering the service of the corporation after August 5, 1891—the date of the passing of the Act—should contribute and pay to the Thrift Fund a certain percentage of his salary or wages, which contribution or payment might be deducted pro ratâ by the corporation from time to time as and when the salary or wages should become payable, and no such person should cease to so contribute to the Thrift Fund while in the service of the corporation.

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By art. 2 of the scheme, "Any person who on the 5th August, 1891, was in the service of the corporation, whatever his remuneration . . . . may, by an application in writing under his hand, be admitted to the benefit of the Thrift Fund, and become and continue to be a contributor in the same manner and upon the same terms and conditions in every respect as if he were one of the persons to whom article 1 of the scheme applies: provided that no person who shall have been so admitted and shall so become a contributor shall cease to contribute to the Thrift Fund while in the service of the corporation."

The appellant Thomas Hudson, the deputy town clerk of the city of Manchester, was in the service of the corporation prior to and on August 5, 1891, and therefore came within the meaning of art. 2 of the scheme, and it was optional with him to apply to be admitted to the benefit of the Thrift Fund. Accordingly, on August 31, 1892, he made an application in writing under his hand to be so admitted, and he thereupon became and has since continued to be a contributor to the fund, and under the provisions of the scheme he cannot cease to contribute to the fund while in the service of the corporation.

On April 11, 1901, he appealed against an assessment to income tax of 800*l.* made upon him for the profits of the office or employment held by him, and claimed to be allowed a deduction in respect of his contributions to the fund. He relied on s. 146 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), "Rules for charging the duties under Schedule E." By the first rule it is provided that the duties should be annually charged on the persons exercising the offices or employments of profit mentioned in the schedule for all salaries, fees, wages, perquisites, or profits accruing by reason of such offices or employments, "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and bonâ fide paid and borne by the party to be charged." By the ninth rule it is provided that, in estimating the duty payable for any such office or employment of profit . . . . all official deductions and payments made upon the receipt of the salaries and profits thereof shall be allowed to be deducted, provided that a due account thereof be rendered to the Commissioners and proved to their satisfaction. The appellant contended that under these rules he was entitled to deduct the amount of his contribution to the Thrift Fund from his salary, and that he was only chargeable on the amount of his salary after making such deduction.

The Commissioners, after hearing the appeal, refused to allow the appellant's claim and confirmed the assessment, but stated this case for the opinion of the Court.

Asquith, K.C. (*Ryde*, with him), for the appellant. The case is indistinguishable from *Beaumont* v. *Bowers*. (1) There, as here, the deduction from salary was made by virtue of an Act of Parliament, which was made to affect the particular case by an act of the appellant himself. In *Beaumont* v. *Bowers* (1) the appellant did not avail himself of the option allowed him by the Act in question in that case of signifying in writing to the authorities within three months after the commencement of the Act of his intention not to avail himself of the provisions of the Act. Here he exercised the option given him by the Act of availing himself of its provisions; but that can make no difference.

[They also referred to *Herbert* v. *McQuade*. (2)]

The Solicitor-General (*Sir E. Carson, K.C.*), (*S. A. T. Rowlatt* with him), for the Crown. The deduction from the appellant's salary was not made by virtue of any Act of Parliament, but by virtue of his contract with the corporation, and his acceptance of the scheme for the Thrift Fund. The object of the Act of Parliament was to enable the corporation to contribute to the Thrift Fund, and their contribution was the inducement which caused persons like the appellant to contract with the corporation to take the benefit of the scheme. The case is, therefore, different from *Beaumont* v. *Bowers* (1), where the compulsion to contribute was by virtue of the Act.

The fact that, having once agreed to accept the scheme, the appellant cannot cease to allow the deductions from his salary is not a result of the Act of Parliament, but of the scheme established under the Act, and of the appellant's own acceptance of the provisions of that scheme.

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(1) [1900] 2 Q. B. 204.

(2) [1901] 2 K. B. 761.

Asquith, K.C., replied.

PHILLIMORE J. I have to consider whether the appellant in this case can claim to deduct the sum which he pays to the corporation of Manchester under a Thrift Fund scheme on the ground that what he pays to the corporation is a deduction from the salary of an "amount of duty or other sum payable or chargeable on the same by virtue of any Act of Parliament." The corporation of Manchester are enabled by Act of Parliament to make this deduction from salary if the appellant chooses to let them do it, and they are enabled by Act of Parliament to supplement it by contributions; and they are to invest the fund so created for the benefit of the appellant and his fellows. They are enabled by Act of Parliament to compel their future servants to come into these terms; and it has been admitted by the Crown that the future servants who are under such compulsion by virtue of the Act of Parliament and the scheme may claim to deduct the sum that they pay by virtue of it from the amount of their income tax. With regard, however, to the servants who were in the service of the corporation of Manchester before and on August 5, 1891, there is no compulsion on any such servant to accept the terms of the scheme; he does not pay the deduction, or allow the corporation to make the deduction, by virtue of an Act of Parliament. The only way the Act of Parliament comes in is to enable the corporation to contract, and it may be said, to compel the corporation to receive applications from the appellant and persons in his position if they choose to make them; but, again, only subject to such terms and conditions as the corporation may think fit to impose. No doubt it is contemplated by the Act of Parliament that the corporation shall hold out the same terms to everybody by the scheme; and, no doubt, as long as the scheme remains, the corporation must accept any application upon the terms set out in the scheme; but they are entitled to vary the scheme; and the utmost that can be said is that the corporation are enabled, and, in certain circumstances, compelled, to deal with the appellant if he chooses to apply to them to be admitted to the benefits of the Thrift Fund; but there is no compulsion put upon him by the existing scheme, which they may modify as long as they do not modify it to his disadvantage. No doubt, after his application and his admission by the corporation to the benefits of the Thrift Fund, he is bound by the scheme: so long as he continues the servant of the corporation he cannot cease to contribute his due proportion to the fund; but that is not by virtue of any Act of Parliament. There is no such provision in the Act of Parliament. I cannot find that this sum is payable or chargeable upon the appellant's salary "by virtue of any Act of Parliament." I think the case differs widely from that of *Beaumont* v. *Bowers* (1), where the actual compulsion was upon the applicant. He was actually compelled in that case to submit to the deduction, unless he chose on a day then past to express positively once and for all his refusal to be bound by the Act. I do not see that the power of option was much discussed or dwelt upon by the Court in that case; but, even supposing it was, it is quite a different power to the power in this case. Here the deduction from his salary is not really charged upon him by any Act of Parliament at all. It might almost as well be said that an Act of Parliament has said that every contract in writing shall be enforced and charged upon any man who enters into such a contract. This deduction is chargeable here upon him by virtue of his application, which the corporation are enabled, and to some extent compelled, by Act of Parliament to accept.

I think there must be judgment for the Crown with costs.

Judgment for the Crown.

Solicitors for appellant: *Austin & Austin, for Thomas Hudson, Manchester.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

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(1) [1900] 2 Q. B. 204.

1902
June 17.

WALTER *v.* YALDEN.

Limitations, Statute of—Action to Recover Land—Lease—Trespasser—Title against Lessee—Surrender of Lease—Expiration of Term—Lessor's Right of Re-entry—Real Property Limitation Act, 1833 (3 & 4 *Will*, 4, *c.* 27), *s.* 34—*Period of Limitation—" Future Estate "—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 2.

Where a trespasser on land let on lease has as against the lessee acquired a title under the Statutes of Limitations, and the lessee subsequently surrenders the lease to the lessor, the lessor has no right of re-entry, and the period of limitation does not begin to run, until the expiration of the term for which the lease was granted.

A reversion in fee simple expectant on the determination of a lease for years or lives is not a " future estate or interest " expectant on a particular estate within s. 2 of the Real Property Limitation Act, 1874.

Appeal of the defendant from the judgment of the county court judge of Berkshire given in favour of the plaintiff in an action brought to recover from the defendant possession of a cottage with garden and land thereto belonging, situate in the parish of Barkham, in Berkshire, of which the defendant claimed to be the owner.

By an indenture of lease dated February 7, 1837, John Leveson-Gower, lord of the manor of Barkham, demised the premises in question to Isaac Pothecary and George Pothecary, their executors, administrators and assigns, from the day of the date thereof " for during and unto the full end and term of ninety-nine years from thence next ensuing and fully to be complete and ended if " three named persons " shall so long live," paying therefor the yearly rent of 1*s*.

By an indenture of conveyance dated February 2, 1867, and made between one Watts of the one part and the defendant of the other part, Watts granted unto the defendant the premises in question, to hold to the use of the defendant, his heirs and assigns, for ever. The premises were described in the conveyance as being then and as having been for the last thirteen years in the occupation of Watts, and before then for eleven years in the occupation of one Fulker, from whom Watts obtained possession of the same.

The defendant remained in possession of the premises up to the date of the action without ever having paid any rent.

On October 6, 1884, the freehold of the manor of Barkham and of certain other lands was conveyed by John Edward Leveson-Gower, the then lord of the manor, to John Walter, the plaintiff's father and predecessor in title. On the hearing of the appeal a question was raised as to whether the freehold of the premises in question passed under this conveyance, it being contended on behalf of the defendant that the premises formed part of the manor of Barkham, and were, therefore, included in the conveyance, the plaintiff, on the other hand, contending that the freehold was not acquired by the plaintiff until a later date, namely, September 16, 1901. The Court, however, in giving judgment, assumed in favour of the defendant (but without deciding the question) that John Walter acquired the freehold of the premises in question in 1884, and it, therefore, is not necessary in this report to set out the facts relating to this part of the case.

By an indenture dated September 1, 1885, and made between Walter Pothecary and John Walter, and indorsed on the lease of 1837, after reciting that Walter Pothecary was the sole surviving executor of the survivor of the lessees, and that John Walter was entitled to the fee simple of the premises comprised in the lease, it was witnessed that Walter Pothecary, as such surviving personal representative as aforesaid, so far as he could or lawfully might, but not further or otherwise, surrendered to John Walter all the premises demised by the lease, to the intent that the residue of the term of years and all other the estate and interest of Walter Pothecary, as such personal representative as aforesaid, under or by virtue of the lease, might be merged and extinguished in the reversion and inheritance of the premises.

John Walter died on November 3, 1894, the plaintiff being his successor in title.

On January 2, 1895, the last of the three lives, for which the lease of 1837 had been granted, dropped.

The action was commenced on January 25, 1902. The county court judge gave judgment for the plaintiff. The defendant appealed.

St. Gerrans, for the defendant. In 1884 the plaintiff's predecessor in title acquired the freehold of the property, and in 1885 he accepted a surrender of the term, and thereby acquired an immediate right of re-entry. The statute began to run on September 1, 1885, and, the action not having been brought within twelve years from that date, the claim is barred. For the plaintiff, reliance is placed upon a passage in Darby and Bosanquet's Statutes of Limitations, 2nd ed. p. 494, citing *Rankin* v. *McMurtry* (1) as an authority for the proposition that the possession of a trespasser as against a lessee only confers on the former a title commensurate with the interest which the latter has lost, and it is contended, therefore, that the defendant's possession prevented the surrender of the lease from operating as a merger, and that the statute only began to run in 1895, when the lease terminated through the dropping of the last of the three lives. This view of the law is erroneous. The trespasser, as against the lessee, acquires more than the term, for an estate gained by wrong is always an estate in fee simple: see Williams on Seisin of the Freehold, p. 7; *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (2); but although the possession of the defendant, a trespasser, was good as against the lessee, it did not prevent the surrender by the latter from being effective so as to confer on the freeholder an immediate right of re-entry. Secondly, assuming that the statute only began to run in 1895, when the last life dropped, the lessee's interest was a "particular estate" within the meaning of the latter portion of s. 2 of the Real Property Limitation Act, 1874 (3), and the period within which the plaintiff must have brought his action is, therefore, not twelve, but six years from 1895. [He referred to *White* v. *Earl of Devon.* (1)]

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(1) (1889) 24 L. R. Ir. 290.

(2) (1880) 5 App. Cas. 736.

(3) Real Property Limitation Act, 1874, s. 2: "A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person

Buckmaster, K.C. (*Cecil Walsh* with him), for the plaintiff. The latter part of s. 2 has no application to this case. No doubt a term of years may for certain purposes be a particular estate, but it is not a "particular estate on which any future estate or interest was expectant," because a reversion expectant on a term of years is not a future estate, but is a present estate. The section applies to future estates created by the reversioner, but not to the reversion itself. Assuming that the freehold passed to the plaintiff's father by the conveyance of 1884, he was not in a position to eject the defendant when the term was surrendered in 1885. The defendant had acquired a good title against the lessee, and the lessee could not by surrendering the term to the landlord accelerate the determination of the term. He had nothing to surrender. The defendant's title could not be displaced by any dealing with the term, whether

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through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress or to bring an action or suit for the recovery of such land or rent shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent."

(1) [1896] 2 Ch. 562.

by a surrender to the reversioner or by an assignment to any one else. The statute, therefore, only began to run in 1895, and the plaintiff's claim is not barred. *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (1) merely involved the proposition that where a lease is surrendered, the person taking the surrender can dispossess any one in possession who has not obtained a title against the lessee. That has no bearing on this case, because here the defendant had acquired a title against the lessee. [He referred to the Real Property Limitation Act, 1833, s. 34.]

St. Gerrans replied.

LORD ALVERSTONE C.J., after stating the facts and saying that, in the view the Court took of the case, it was not necessary to decide the question as to the date at which the plaintiff's predecessor acquired the freehold of the premises, but that the Court would assume in favour of the defendant that it was acquired in 1884, proceeded as follows:—There are, however, two other points taken, both of which, in our opinion, must be answered in favour of the plaintiff. It is contended on behalf of the defendant that, by virtue of the provisions of s. 2 of the Real Property Limitation Act, 1874, the important period in this case was six years from the death of the last life named in the lease, namely, 1895, on the ground that the term of years was "a particular estate," and the estate taken by the reversioner "a future estate or interest" under that section. I think it is clear, on the consideration of the arguments which have been addressed to us, that that cannot be maintained. If that were so, a person who granted a lease would be entitled to the reversion as a future estate within the meaning of that section. I do not think it is possible to maintain that argument, and I think, for the reasons urged by Mr. Buckmaster, that the section was intended to apply to future estates created by the reversioner, and not to the mere reversion itself expectant on the determination of the term of years. Therefore, the argument that the time must be limited to six years from the expiration of the leasehold term, in my opinion, fails. The other point, which certainly is one of some difficulty, and which has merited the very able argument which has been addressed to us, is this: It was contended on behalf of the defendant that, inasmuch as there had been in 1885 a surrender to the person entitled to the freehold, therefore, for the purposes of the point we are considering, the time must be taken to have commenced to run in 1885. On the other hand, it was argued for the plaintiff that the effect of the possession by the defendant was that he had acquired a right which could not be defeated by the lessee, and, therefore, could not be defeated by the reversioner during the term of the lease. It was contended for the defendant that, inasmuch as the trespasser, the defendant, was acquiring that which would become a fee simple, the time began to run as soon as the term was merged in the freehold, and that the termination of the lease is immaterial for the purpose of fixing the date of the commencement of the statutory period. I think one or two considerations shew that that argument cannot be right. It is quite plain that, if the defendant had by twenty years' possession acquired the right to the possession of the property as against the lessees, the lessees could not by assignment or underlease deprive him of that right; and it seems to me to follow, not necessarily that the person who is in possession becomes liable on the covenants of the lease, or is to be treated as being in the position of the lessee, but that the surrender cannot operate so as to deprive him of the title he has got against the persons against whom he is entitled to claim possession. It seems to me that that is really what is intended to be expressed in the passage which has been read from Darby and Bosanquet's Statutes of Limitations, at p. 494. In other words, if you apply it to the ordinary case of a lease, the right of a landlord to resume possession does not arise until the lease has expired. The trespasser is in possession. The landlord may not know, or does not know, under what terms he has originally entered, or how he has got it into his possession; but it seems to me that the right of entry of the landlord does not arise, for the purpose of ascertaining the commencement of the period of limitation, until the expiration of the term, because otherwise the person against whom the possession was rightfully claimed by virtue of the length of holding would be enabled to defeat the operation of that possession in his own favour by some transaction to which the person who had been in possession for the statutory period was not a party. The result is, therefore, that, even assuming that the freehold was in the plaintiff's predecessor in 1885, the time under the Statute of Limitations did not commence to run until the expiration of the lease granted in the year 1837, and, therefore, that the plaintiff's claim is not barred.

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(1) 5 App. Cas. 736.

For these reasons I think that the judgment of the county court judge was right, and that the appeal should be dismissed.

DARLING J. I am of the same opinion.

CHANNELL J. I am of the same opinion. I think that the important and difficult question which we have to consider is whether or not the plaintiff's predecessor obtained a right of entry in 1885 upon the execution of this deed, which purports to be a surrender of the lease. The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment. If the lessee has created underleases, the underleases remain notwithstanding his surrender; the lessee cannot assign his term to any one else so as to put an end to those underleases. But that, I think, is only an example of what he can and cannot do; the point is that he has no power to effect by surrender anything that he could not do by assignment to a third person; the reason being that he cannot convey to his landlord, any more than to any one else, anything that he has not got himself. Then, if that is so, inasmuch as in 1885 Pothecary had lost all title as against the persons in possession of this particular land, he could not have assigned a right of entry to anybody else, and no more could he assign it to his lessor. The result is that a right of entry did not arise in the lessor at the date of the surrender, but only when the last life dropped on January 5, 1895. In that view of the case, it became unnecessary to consider whether the plaintiff's predecessor had in 1885 a legal estate in fee simple in the premises. The only other remaining question is, assuming that the right of entry arose on January 5, 1895—that is, more than six years before the commencement of these proceedings—whether the period within which the action was to be brought was six years or twelve. That depends on the terms of s. 2 of the statute of 1874, and as to that, although it is admitted by Mr. Buckmaster that the term of years may be a particular estate, yet he says, and I think rightly says, that the reversion dependent on a term of years cannot be a future estate within the meaning of the words "if the person last entitled to any particular estate on which any future estate or interest was expectant"; if it is not a future estate within the meaning of these words, the estate or interest of the lessor is an existing estate during the term of the lease, and it cannot be considered to be a future estate. The earlier part of the section clearly does relate to a landlord coming into possession on the expiration of the term of years. The next part, which is that now in question, does not refer to that but to something else, and the reason of it in all probability is that in other cases, as, for example, where there is a settlement, the person coming into possession in a sense does claim through his predecessor. He claims through a similar title, whereas the lessor claims in a totally different way at the expiration of the title which he himself has created.

Appeal dismissed.
Leave to appeal.

Solicitors for plaintiff: *Soames, Edwards & Jones, for Cooke, Cooper & Barry, Wokingham.*

Solicitor for defendant: *A. W. Mills, for F. J. Ratcliffe, Reading.*

F. O. R.

1902
May 13;
June 2.

In re BOROVSKY & WEINBAUM.
Ex parte SALAMAN.

Bankruptcy—Fugitive Offender—Arrest—Offence committed in Foreign State—Bankruptcy of Prisoner pending Extradition—Property found on Bankrupt at date of Arrest—Retention by Police—Title of Trustee in Bankruptcy—Evidence of Crime—Order for delivery up of Property—"Competent Authority" to make Order—Belgian Extradition Treaty, 1872, *art.* 12—*Extradition Act,* 1870 (33 & 34 *Vict. c.* 52), *ss.* 9, 10.

When a fugitive offender, arrested in England on an extradition warrant for offences committed in a foreign State, becomes bankrupt in England pending the hearing of the charge, the property found on him at the date of his arrest vests in his trustee in bankruptcy, subject to this—that it may on his committal be ordered to be delivered up with him to be used as evidence of the crime at the trial; and, in such a case, the Secretary of State, in making the extradition order, should stipulate that, when the criminal proceedings in the foreign State are concluded, the property shall be restored to the jurisdiction of the English Bankruptcy Court.

In such a case the competent authority in the first instance to decide what property found on the prisoner will serve as proof of the crime is the Court which hears the charge and makes the committal order.

THIS was an application by the trustee in bankruptcy claiming certain property under these circumstances.

The debtor Borovsky was a Russian subject domiciled in England, and the debtor Weinbaum was a naturalized British subject. They carried on the business of buyers of and dealers in precious stones in partnership under the style of "Borovsky & Weinbaum" in London and at Antwerp in Belgium. They had an office and banking account at both places, but the London office was their principal place of business.

On March 10, 1902, the debtors were arrested in England on an extradition warrant granted at the instance of the Belgian Government, their extradition being demanded in respect of offences committed at Antwerp against the laws of Belgium. When arrested considerable property was found upon them, consisting of cash, precious stones, and bills of exchange for goods sold to customers; also the keys of a safe at the Chancery Lane Safe Deposit Company, where property of a like nature was found by the police.

On March 14 a receiving order was made against the debtors in England on a bankruptcy petition based on an act of bankruptcy committed by them on the previous March 5, and on March 19 they were adjudicated bankrupt, and Mr. Salaman (the applicant) became the trustee in bankruptcy.

On March 17 the debtors were adjudicated bankrupt in Belgium and a curator of their estate was appointed, and on March 21 a further order was made by the Belgian Court setting back the bankruptcy to February 26.

On April 19 the magistrate at Bow Street made an order on the extradition warrant for the committal of the bankrupts, but declined to make any order with respect to the property found on the prisoners when arrested, on the ground that he was not the "competent authority" to deal with the matter. (1)

On May 5 a motion by the Belgian curator to rescind the receiving order in England and to stay all proceedings thereunder, and that all the property of the bankrupts in England should be handed over to him, was dismissed by Wright J., on the ground that the English bankruptcy was first in point of time, and that there was no evidence that the bankrupts were domiciled in Belgium. (2)

The trustee in bankruptcy now applied for an order on the Commissioner of Police for delivery up to him of the property found on the bankrupts at the date of their arrest, as being part of the estate of the bankrupts divisible amongst their creditors.

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(1) The Belgian Extradition Treaty, 1872, art. 12, provides: "Every article found in the possession of the individual claimed at the time of his arrest shall, if the competent authority so decide, be seized, in order to be delivered up with his person at the time when the surrender shall be made. Such delivery shall not be limited to the property or articles obtained by stealing or by fraudulent bankruptcy, but shall extend to everything that may serve as proof of the crime. . . . The rights of third parties with respect to the said property or articles are nevertheless reserved."

(2) See *In re Artolo Hermanos*, (1890) 24 Q. B. D. 640.

1902

BOROVSKY & WEINBAUM, *In re.* SALAMAN, *Ex parte.*

Muir Mackenzie, for the trustee. Art. 12 of the Belgian Treaty directs that the property found on the prisoner shall be delivered up with him, but the rights of third parties are expressly reserved. In the present case all the property found on the prisoners at the time of their arrest has under the English bankruptcy laws vested in the English trustee in bankruptcy. The magistrate had no jurisdiction to deal with it: *Ex parte Otto.* (1) There is no objection to the property being produced in Belgium for the purposes of the trial, but there should be an undertaking by the Commissioner of Police that the property shall be returned to this country as soon as the trial is concluded.

Sutton, for the Commissioner of Police. No such undertaking can be given. It is the duty of the police to hand over the property with the prisoner to the Belgian authorities. The proceedings on the hearing of an extradition warrant are similar to the hearing on a charge for an indictable offence: Extradition Act, 1870, ss. 9, 10; Summary Jurisdiction Act, 1879, s. 44. The practice is for the police to retain everything found on a prisoner, and on his committal to hand it over to be used as evidence at the trial. There is no direct authority on the point, but the decision in the Irish case of *Dillon* v. *O'Brien* (2) supports this view; and the general course is to hand over anything found on a prisoner to the country asking for his extradition.

[WRIGHT J. Who is the competent authority to deal with the matter?]

It is submitted that it is the police magistrate who hears the charge, or the Home Secretary who signs the extradition warrant.

Edwardes Jones, for the Belgian curator.

Muir Mackenzie, in reply. This Court has refused to hand over this property to the Belgian curator, and under s. 50 of the Bankruptcy Act the trustee in bankruptcy is entitled to the possession of it. It belongs to him and not to the prisoner. This Court, therefore, has jurisdiction in the matter, and will see that the property is not put in peril; and, if it goes out of the jurisdiction, it must do so with proper safeguards for its return.

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(1) [1894] 1 Q. B. 420.

(2) (1887) 16 Cox, 245.

WRIGHT J. I think the police were right to retain the property found on the prisoners, but I much doubt if they have any right to hand it over to the Belgian authorities without an order of the Court. It seems to me plain, however, that I cannot order a transfer of this property to the trustee in bankruptcy until the competent authority, whoever he may be, has decided under the 12th article of the Belgian Extradition Treaty—by which this Court is bound—what portions of it are required for the purposes of the trial in Belgium. In my judgment the competent authority, in the first instance, must be the learned magistrate at Bow Street who made the order for the committal of the bankrupts. I think he should decide what parts of this property are material for the purposes of the trial in Belgium; and I also think that he should have the concurrence of the Secretary of State in handing it over, and that a stipulation may very properly be made when handing it over that it shall be returned to this country after the criminal proceedings in Belgium have terminated. When those proceedings have terminated, the property will be returned to the trustee, but he will have to hold it for a reasonable time in order that any party, Belgian or other, who may claim any portion of it may have an opportunity of making out his title.

Then it seems to me the proper order at present is to adjourn this application until next sittings to see what parts of the property are to be handed over under the extradition order. Those parts which are not handed over will then be considered more in detail, and a time will probably have to be fixed within which Belgian and other claimants must come in and prove their title. I will deal with that when it arises. An application ought to be made at once to the learned magistrate to decide, if he is willing to do so, what articles are material as evidence in the criminal proceedings; and I think that the Secretary of State should be applied to, and that he should be asked to request that there may be an undertaking to redeliver these articles after the criminal proceedings are terminated, with an intimation that every opportunity will be given to Belgian and other claimants to establish their rights.

June 2. The motion now came on for further hearing.

Muir Mackenzie, for the trustee. This matter has been again before the magistrate, and he has decided that all the property found in the possession of the prisoners, including that at the Chancery Lane Safe Deposit Company, is property which may serve as proof of the crime. The bankruptcy in England is proceeding, and a large number of creditors, both English and Belgian, have come in and proved. This property, though found in the bankrupts' possession, is not their property, but belongs to the trustee in bankruptcy. It is practically all the property that would be available for distribution amongst the creditors. The trustee asks for an order to safeguard it, so that, after the criminal proceedings in Belgium are concluded, it may come back to be dealt with in the English bankruptcy.

WRIGHT J. I must give effect to the Belgian treaty, which says this property is to go to Belgium. The only question is, how to secure that the property shall be returned to the custody of this Court when the ends of justice have been satisfied in Belgium.

Sutton, for the Commissioner of Police. It is submitted that an order should be made that this property shall go with the prisoners to Belgium, on an undertaking being given by the Belgian authorities that, as soon as the criminal proceedings in Belgium are concluded, the property shall be restored to the jurisdiction of this Court.

WRIGHT J. I must have an undertaking to that effect.

Bodkin, for the Belgian authorities. These authorities do not in any way appear as parties to the bankruptcy proceedings. They are merely here taking formal part under the

Extradition Treaty. If the Secretary of State, when making the order for the surrender of the criminals, will request that there may be an undertaking to redeliver this property after the criminal proceedings in Belgium are concluded, the Belgian authorities will gladly acquiesce.

WRIGHT J. Then the order is agreed.

Edwardes Jones, for the Belgian curator. A great deal of the property was in fact stolen, and belongs to third parties in Belgium. The undertaking should be limited to such parts of the property as are assets in the English bankruptcy.

WRIGHT J. I cannot do that. When the property has been returned to this country, this Court will give any Belgian claimant full opportunity of establishing his title before any final distribution of it is made.

Solicitors for trustee: *Osborn & Osborn.*
Solicitors for Commissioner of Police: *Wontner & Sons.*
Solicitors for Belgian curator: *Crawley, Arnold & Co.*

H. L. F.

Dictum of CHANNELL, J., at p. 336,
approved. KING *v.* SMITH. [1950]
1 All E.R. 553.

1902
April 11;
May 14.

EAST STONEHOUSE URBAN DISTRICT COUNCIL *v.* WILLOUGHBY BROTHERS, LIMITED.

Limitations, Statute of—Leaseholds—Settlement by Lessee—Encroachment by Cestui que Trust on other Land included in same Settlement—Accretion to Holding for Benefit of Lessor—Presumption—Person claiming through a Trustee—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 7, 25.

Two adjoining pieces of land, herein referred to as the foundry and the stable, were in 1819 and 1831 respectively demised by the same lessor to the same lessee for ninety-nine years or three lives. The leases contained a covenant by the lessor to renew in certain events. In 1846 both pieces and certain other lands of the lessee were assigned by him to trustees to hold in trust for the lessee for life, and thereafter as to the foundry upon one set of trusts, and as to the residue upon another set of trusts. From some date prior to 1843, and down to the death of the lessee in 1848, two portions of the stable property were occupied by the lessee as part of and in connection with the business carried on by him on the foundry property. After his death these two portions continued to be so occupied by the cestuis que trust of the foundry, and the defendants, their successors, without any acknowledgment, down to the date of this action. In March, 1856, the foundry lease, and in August, 1856, the stable lease, were renewed, new leases on the same terms for ninety-nine years or three lives being granted to the trustees of the settlement. In July, 1890, a new lease of the foundry was granted to the then cestui que trust occupying the foundry and the two portions of the stable property. This lease was subsequently sold to the defendants. In 1894 a new lease of the stable was granted to the trustees, which was again renewed in 1898. This renewed lease was in 1901 sold to the plaintiffs, who on July 18, 1901, commenced this action, claiming to recover from the defendants the two portions of the stable property which had been occupied as part of the foundry property:—

Held, that the plaintiffs' claim was not barred; that at the date of the stable lease of August, 1856, the possession in law of the disputed portions was in the trustees so as to enable them to surrender them to the lessor and to obtain a regrant from him, and that the Statute of Limitations did not begin to run against the lessor in 1856, but only in 1894, on the determination of the stable lease of August, 1856; that the occupiers of the disputed portions were persons claiming through a trustee within s. 25 of the Statute of Limitations, 1833, and that the statute, therefore, did not run in their favour:

Held, also, that, assuming that the statute began to run in 1856 against the lessor, the disputed portions became an accretion to the property comprised in the foundry lease, and on the determination and surrender of that lease in July, 1890, i.e., within twelve years of the commencement of the action, the lessor acquired a new right of possession, there being nothing to rebut the presumption that the encroachment enured for the benefit of the lessor.

FURTHER CONSIDERATION of an action of ejectment tried by Channell J. without a jury at the Exeter Assizes.

The facts, which are fully stated in the judgment, were shortly as follows: In 1819 a lease of certain premises, referred to hereafter as the foundry, was granted by the then Lord Mount Edgcumbe to James Moir for ninety-nine years or three lives. In 1831 certain other premises, referred to hereafter as the stable, adjoining the foundry on two sides, were demised by the same lessor to James Moir for ninety-nine years or three lives. Both leases contained a plan and a description of the boundaries and dimensions of the respective premises. The leases were renewable if the lessee applied for the renewal within a limited time after the first life dropped.

Two separate portions of the stable property, consisting of a smith's shop and a strip of land, both abutting on the foundry, were from some date prior to 1843 used by James Moir in connection with the business carried on by him on the foundry property.

In 1842 James Moir assigned the foundry, the stable, and certain other premises to trustees to hold on such trusts as he should thereafter appoint.

In 1846 James Moir executed the power of appointment by appointing all the premises comprised in the deed of 1842 to himself for life, and thereafter as to the foundry upon trust to pay the rents thereof to his son John Moir for life, with permission to him to occupy the same; and after his death upon trust to assign the same to the children of John Moir; and as to the residue of the property comprised in the deed of 1842, upon trust to divide the rents between James Moir's grandson and two married daughters for life, and then to their children. James Moir also appointed that the smith's shop and another portion of the stable property might be rented by John Moir

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for 20*l.* a year. The deed did not in terms refer to the strip of land.

James Moir died in 1848.

John Moir occupied the foundry and the smith's shop and the strip of land until his death in 1853, but he paid no rent for the smith's shop.

John Moir's widow continued to occupy the same premises, carrying on the business of the foundry for the benefit of the children.

In March, 1856, the foundry lease, and in August, 1856, the stable lease, were renewed, a new lease of each property for ninety-nine years or three lives being granted to the trustees of the settlement.

Subsequently to 1856 Mrs. Triscott, a daughter of James Moir, acquired the beneficial interest in the foundry from the other cestuis que trust, and continued the occupation of the foundry and the smith's shop and strip of land. No assignment to her was ever executed by the trustees.

On July 24, 1890, the lease of the foundry was surrendered, and a new lease thereof was granted by Lord Mount Edgcumbe to Mrs. Triscott. Mrs. Triscott subsequently sold this lease to the defendants.

On December 7, 1894, the trustees obtained from Lord Mount Edgcumbe a renewed lease of the stable property, which was in 1896 assigned to one Saltern.

In 1898 Saltern obtained a renewed lease of the stable property from Lord Mount Edgcumbe, which lease was in 1901 sold by him to the plaintiffs.

In the leases of 1856, and in all the subsequent leases, the dimensions and plans in the original leases of 1819 and 1831 were, respectively, followed.

On July 18, 1901, the plaintiffs commenced this action, claiming to recover from the defendants the smith's shop and the strip of land, which, as stated above, had been continuously occupied by the cestuis que trust of the foundry, and subsequently by the defendants, since the death of James Moir in 1848.

Upjohn, *K.C.* (*Clavell Salter* and *J. A. Hawke* with him), for the plaintiffs. The statute did not begin to run against the lessor until December, 1894, when the stable lease was surrendered, and that, being within twelve years of the commencement of the action, the plaintiffs' claim is not barred. The defendants contend that the statute began to run at the date of the surrender of the stable lease in August, 1856. That depends on the nature of the occupation of the premises in dispute by John Moir, after the death of James Moir in 1848, and subsequently by John Moir's widow and daughter. If they had occupied under a sub-tenancy expressly created by the trustees of the settlement, that sub-tenancy would not have been affected by the surrender of the stable lease in 1856, but by virtue of 4 Geo. 2, c. 28, s. 6, would have remained a valid tenancy; the lessor would have acquired no right of entry on the disputed premises and the statute would not have begun to run at that date. There is no evidence of any express sub-tenancy, but, taking a reasonable view of all the circumstances, it must be assumed that they occupied as tenants rather than as trespassers, with the result that the statute did not begin to run in 1856. Sect. 7 of the Real Property Limitation Act, 1833 (1), does not apply to this case because the tenancy was one between trustees and cestuis que trust. Secondly, if there was no tenancy, the whole property was trust property vested in the same trustees. The mistake of the trustees in permitting the occupation of the disputed premises as part of the foundry property did not enable one set of beneficiaries to acquire a title as against the other set:

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(1) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7: "And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

Real Property Limitation Act, 1833, s. 25 (1); *Lister* v. *Pickford* (2); *Knight* v. *Bowyer.* (3)

Again, the occupiers having obtained possession through being cestuis que trust of the foundry property, their possession was on behalf of the trustees, in whom the legal estate in both properties was vested. In 1856 the trustees applied for and obtained renewals of both leases. The new leases were not granted voluntarily, but in pursuance of covenants for perpetual renewal, and the trustees were, therefore, entitled to renewals. There was no formal surrender, and the original leases remained in the trustees until the new leases were granted. This distinguishes the case from *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (4) The lessor, therefore, obtained no right of re-entry in 1856: *Corpus Christi College, Oxford* v. *Rogers* (5); *Ecclesiastical Commissioners for England* v. *Treemer.* (6) Lastly, assuming in the defendants' favour that the statute began to run in or before 1856, what was the nature of the title acquired by the occupiers of the disputed premises? They acquired a title against those entitled under the stable lease, but they did not become assigns of any part of the property comprised in that lease: *Tichborne* v. *Weir.* (7) They acquired possession of and title to the premises through the fact that they were the beneficiaries under the foundry lease, and the case falls within the doctrine that an encroachment by a lessee must be presumed to have been for the benefit of the lessor and must be treated as part of the demised premises: *Andrews* v. *Hailes* (8); *Whitmore* v.

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(1) Sect. 25: "Provided always and be it further enacted, That when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

(2) (1865) 34 Beav. 576.

(3) (1858) 2 De G. & J. 421.

(4) (1880) 5 App. Cas. 736.

(5) (1879) 49 L. J. (Q.B.) 4.

(6) [1893] 1 Ch. 166.

(7) (1892) 8 Times L. R. 713.

(8) (1853) 2 E. & B. 349.

Humphries (1); *Tabor* v. *Godfrey*. (2) Therefore, when the foundry lease terminated (which it did within twelve years of the commencement of the action), the disputed premises, as part of the foundry, reverted to the lessor, and the title obtained by the occupiers was lost. In either view of the case, the plaintiffs are, therefore, entitled to succeed.

Foote, K.C. (*Bodilly* with him), for the defendants. It may be that John Moir during his life occupied the smith's shop, though not the strip of land, under an agreement of tenancy with the trustees; but for the purpose of the defendants' case it is sufficient to start from the date of his death in 1853. The subsequent occupation by his widow was as a tenant at will, and in the case of the strip either as tenant at will or trespasser, and, therefore, under s. 7 of the Act of 1833, the statute began to run against the trustees, as lessees, at the expiration of one year from the commencement of the tenancy. The proviso to s. 7 has no application to the present case, where the tenancy, if any, was between the cestuis que trust of one property and the trustees of another property. Then, in 1856, the trustees surrendered both leases to the lessor. They did not give up actual possession of the disputed premises, because they had not got it, but they surrendered to the lessor their right to possession, and the statute began to run against the lessor at the date of the surrender and renewal of the stable lease, namely, August, 1856. The fact that the surrender and renewal occurred on the same day is, for this purpose, immaterial: see per Lord Selborne in *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (3), explaining *Corpus Christi College, Oxford* v. *Rogers*. (4) As to the contention that the lessor acquired no right of entry in 1856 because the renewals were made under a covenant to renew, that is an attempt to make a distinction between a customary renewal and a covenant to renew. For the purposes of the landlord's right of re-entry against a trespasser there is no distinction, though possibly the lessor would have recovered as trustee for the lessee.

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(1) (1871) L. R. 7 C. P. 1.

(2) (1895) 64 L. J. (Q.B.) 245.

(3) 5 App. Cas. at pp. 741, 742.

(4) 49 L. J. (Q.B.) 4.

Then it is said that the statute does not run at all in this case, where there are two sets of beneficiaries holding from one set of trustees. The cases cited do not support that contention. They only decide that where the trustee in possession makes a mistake as to the persons who really are his cestuis que trust the statute does not run so as to affect the rights of the cestuis que trust inter se: see Darby and Bosanquet's Statutes of Limitations, 2nd ed. p. 444; but the whole point of the present case is that the trustees here ceased to be in possession. Where there are two separate properties subject to separate trusts, the mere fact that the trustees happen to be the same in each case does not prevent the statute from running in favour of one set of cestuis que trust who have obtained possession adversely to the trustees. The doctrine of encroachment has no application to this case; it only applies to cases between lessor and lessee, where the lessor seeks to recover possession on the termination of the lease. But, even if this case can be dealt with as one of encroachment, the fact that the lessor in 1890 granted a new lease of the foundry without including the encroachment in it conclusively rebuts the presumption that the encroachment was for the lessor's benefit: *Attorney-General* v. *Tomline* (1); Darby and Bosanquet's Statutes of Limitations, 2nd ed. p. 503.

Upjohn, K.C., in reply, cited *Board* v. *Board* (2) and *Burroughs* v. *M'Creight.* (3)

Cur. adv. vult.

May 14. Channell J. read the following judgment:—This is an action of ejectment which came on for trial before me at the last assizes at Exeter, and the points of law arising in it have since been argued on further consideration before me in London. Stated shortly, the question is what is the effect of the parties beneficially interested in the leases of a plot of land at East Stonehouse having for many years, without payment of rent or acknowledgment, used and occupied two pieces of land outside their proper boundary, and included in the parcels demised by leases of an adjoining plot. The leases were under the same landlord, and each lease had been renewed several times without any notice being taken of the fact that the occupation did not correspond with the parcels described as demised. The case is further complicated by the fact that for a considerable part of the time the terms created by the leases were legally vested in the same persons as trustees. It is necessary to state the facts precisely. In the year 1819 Lord Mount Edgcumbe granted to James Moir a lease for ninety-nine years, provided three named persons lived so long, of a plot of land at East Stonehouse described by its dimensions and by reference to a plan. The lease was at a small rent, and was renewable at a fixed fine if the lessee applied for the renewal within a limited time after the first life dropped. This lease has been renewed on similar terms in 1835, 1856, and in 1890, and the plot of land demised has always been described as of the same dimensions, and the plans on the leases have been identical, except as regards the names of the occupiers of the lands adjoining. It is a quadrangular plot bounded by four straight lines, and, the dimensions being given in the plans, it is quite easy to identify. On the plot of land so demised James Moir built a foundry, and in the argument before me this plot was called the foundry plot, and the leases of it the foundry leases, and it will be convenient to use the same terms in my judgment.

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(1) (1880) 15 Ch. D. 150, at pp. 159, 160.

(2) (1873) L. R. 9 Q. B. 48.

(3) (1844) 1 Jo. & Lat. 290.

In 1831 Lord Mount Edgcumbe granted to the same James Moir a similar lease for ninety-nine years, subject to three lives, of land adjoining the foundry plot. This second plot was called in the argument before me the stable plot, as at one time there was a stable on it, and the leases of the plot were called the stable leases. The original stable lease was renewed in 1856 and 1894 and 1898, and the description of the plot demised and the plans on the lease were always the same. The stable plot abutted on the foundry plot on the north and west sides of the foundry plot. On the west side of the foundry plot and extending all along that west side there was a small strip included in the stable plot. On the north side of the foundry plot was the larger portion of the stable plot; on the east side of both plots was a street called Phœnix Street, and on the south side of the foundry plot and along the south end of the strip was a road called Buckingham Place.

Prior to the year 1843 (to which date the memory of one of the witnesses called before me went back) James Moir was using the strip of the stable property which was on the west side of the foundry property as a yard in which he stored articles from the foundry. There was then a wall at the northern end of the strip dividing it from the rest of the stable property, then used as a garden, in which wall there had at one time been a door into the garden; but in 1843 the door had been bricked up, and it has remained so ever since. That strip has from that time always been occupied with the foundry as a storage yard, and there has been no access from it to the other part of the stable property except through the foundry, and it is one of the two pieces sought to be recovered in this action.

James Moir also had erected prior to 1843, on the stable property on the Phœnix Street side, some workshops or sheds which he used in connection with the foundry. The other land and buildings the subject of this present action are at this spot. They now consist of a smith's shop, which adjoins the foundry plot, and a loft and room used as a pattern-shop, which is over a stable. The stable is in the possession of the plaintiffs, who are the present lessees of the stable plot; but the smith's shop and loft or pattern-shop are in the possession of the defendants, the present lessees of the foundry plot. According to the recollection of the older witnesses, there have been some slight alterations in these buildings since they first recollect them in James Moir's possession; but this, I think, is immaterial.

In 1842 James Moir, being then the lessee both of the foundry plot and of the stable plot, and also of two other leaseholds, made a settlement bearing date January 12, 1842, whereby he assigned all the four leaseholds, and also the stock-in-trade and chattels used in the foundry, to William Lane, to hold on such trusts as he should thereafter by deed appoint, and until appointment for himself. By deed dated November 18, 1846, he executed this power of appointment. This deed requires careful consideration. It was assumed in the argument by counsel on both sides that by this deed the beneficial interest in the foundry lease was given on one set of trusts, and the beneficial interest in the stable lease on another set of trusts, and, after carefully considering the deed, I have come to the conclusion that this assumption of counsel is correct; but I think it is material to notice, as accounting possibly for what has occurred, that it might quite well be contended that the deed gave all of the premises, whether in the one lease or the other, upon which the foundry business was then being actually carried on upon the one set of trusts, and the residue of the property only upon the other set of trusts. This deed of 1846 does not recite the leases, but only the previous deed of settlement of January 12, 1842, and other apparently similar settlements of other property of the same date. The settlor first appoints all the properties to himself for his life, and makes appointment of premises other than those to which this action relates, and then appoints "all that piece or parcel of land situate in Phœnix Street whereon the said J. Moir party thereto carried on his business of an iron-founder, together with all buildings and erections thereon, upon trust to pay the rents and profits thereof to John Moir, son of him the said James Moir, or permit him to occupy the same during his life or until he should assign or charge his interest"; and on the determination of John Moir's interest, upon trust to assign the same to the children of John Moir on their attaining twenty-one. He then directed a sale of the stock-in-trade, &c., of the iron-foundry business, but gave John Moir the right to purchase it at a valuation. No doubt, therefore, he contemplated that John Moir should carry on the business of the foundry, and the words which he used in appointing the property are capable of passing all the land and buildings on which the business of the foundry was actually carried on without reference to the title being under one lease or the other. He made no express appointment of the stable property, but he appointed the residue of the properties in the settlement upon trust to divide the rents and profits between a grandson and two married daughters for their lives, and afterwards for their

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children. The deed then went on as follows: "and the said James Moir party hereto doth hereby further appoint that the smith's shop and stable erected on the garden situate in Phœnix Street shall be rented by the said John Moir so long as the said John Moir shall see fit at the yearly rent of 20*l.*, the said John Moir paying all rates and taxes in respect of the same."

As the smith's shop (which is the same smith's shop as is now in dispute) was clearly then used with the foundry business, and was by this clause as to renting clearly assumed not to have been appointed to John Moir, I think the true construction of the deed must be to give only so much of the foundry property as was included in the foundry lease to John Moir. Further, there is no provision for apportioning the rent or the sums payable on renewal under the stable lease, as there should have been if that property was to be divided. Probably it was intended that John Moir should rent all of the property used with the foundry but included in the parcels demised by the stable lease. But the settlor seems to have omitted the strip to the west of the foundry, and it looks as if he had been under the impression that the only part of the stable property used with the foundry was the smith's shop and stable. There is no evidence of any rent having been paid by James Moir for the smith's shop, nor is there any evidence of the stable having ever been occupied by John Moir. He did, however, occupy, and so did his children, both the smith's shop now in question, which is what he was to be allowed to rent with the stable, and also the pattern-shop over the stable, and the strip towards Buckingham Place, which is not mentioned in the deed of 1846 at all.

James Moir died in 1848, and John Moir the son carried on the foundry business, and died in 1853. His widow then carried it on, and subsequently one of his daughters, Mrs. Triscott. The widow took nothing herself under the settlement, and no doubt she was acting as trustee and manager for her children, some of whom were certainly under age. On March 12, 1856, the foundry lease was renewed, and on August 27, 1856, the stable lease was renewed, each new lease being granted to the settlement trustees.

It becomes important, therefore, to see what was the character of the possession which John Moir's widow had in 1856 of the two pieces of land in dispute. Mr. Foote, for the defendant, contended that as to both pieces she was either a trespasser, or at most a tenant at will. Even if John Moir had been tenant of the smith's shop, the right to occupy that as tenant seems to be given wholly to him personally "so long as he shall think fit," and, therefore, a tenancy under the strict terms of the appointment would end at his death. How John Moir, and subsequently his widow, came to be allowed to retain possession of the two pieces of land in dispute without payment of any rent to the trustees cannot now be ascertained for certain. I, however, draw the inference from such evidence as I had before me that it was by mistake, and that the plans on the leases were never examined. As regards the smith's shop, no doubt the terms of the clause as to renting that and the stables ought to have drawn attention to the fact that it was included in the demise of the stable property, but this was possibly overlooked. It is, of course, possible that at first rent was paid and that the payment was discontinued; but there is no evidence of it, and as the stable was not occupied the 20*l.* would not be payable. I am, therefore, not justified in assuming rent to have been paid or that any actual tenancy was created. At the same time, the occupation of those pieces cannot be said to have been a trespass. It must have been by the permission in fact of the trustees, though that permission was probably given in the mistaken belief that the occupation was in accordance with the trust, though in fact it was not. I shall have to consider presently what the condition of things must be taken to have been at the time of these renewals in 1856, but will continue the history of the case first.

The leases granted by way of renewal both in 1856 and at other times appear always to have been in the same form. They referred to the former lease, and stated that the new lease was granted in consideration of the term granted by the previous lease being "merged by the regrant of the same tenement to the lessees in whom the whole legal interest in the residue of the said term is now vested as is hereby covenanted and warranted by the said lessees." Subsequently to 1856 Mrs. Triscott, a witness called at the trial, a daughter of John Moir and granddaughter of James Moir the settlor, bought or succeeded to the beneficial interests of her brothers and sisters in the foundry property, and she carried on the foundry business herself, occupying and using the disputed premises. There was no evidence (unless the recital which I am about to mention can be considered evidence) that she ever got an assignment from the trustees of the legal estate in the foundry term; but by deed dated July 24, 1890, Lord Mount Edgcumbe granted to her a new lease of the foundry plot by the old description and plan. There was, it is true, an inaccurate statement in the plan as to the land immediately adjoining the west and north boundary being occupied by certain premises, when in fact the disputed pieces which were in Mrs. Triscott's own occupation, intervened; but this, I think, is quite immaterial. This deed contains the same statement as to Mrs. Triscott being entitled to the whole legal interest which I have quoted above. This is the only kind of evidence that she ever had the legal estate. It was stated by Mr. Clavell Salter in opening the case, and I understand it to be admitted, though I have no note of an express admission, that all three lives in the lease of March 12, 1856, had dropped before July 24, 1890, so that Lord Mount Edgcumbe was not bound to grant a renewal unless he pleased; and under these circumstances he would not very strictly investigate Mrs. Triscott's title. The date when the last of the three lives in the lease of March, 1856, dropped was not stated, but I assume it to have been in the year 1890, shortly before the new lease was granted. Since the case was argued I have endeavoured to get further information on this point, and on some other points which appeared left in doubt, but I am informed that there are reasons why I cannot have any further information now. Down to this time (July, 1890) the legal interest in the two terms created in 1856 was in the trustees of the settlement, unless they had at some previous time executed to Mrs. Triscott the assignment to which she was entitled, which I think they never did. About the time of renewing the lease in 1890 Mrs. Triscott let the foundry to the present defendants, and subsequently sold it to them. In 1893 an action was commenced for the partition of the settled property, and in the judgment in that action it was, amongst other things, directed that the lease of the stable property of August, 1856, should be sold. Before the sale (probably by direction of the Court) the then trustee, one Taylor, took a renewed lease from Lord Mount Edgcumbe dated December 7, 1894, in the usual form and with the old description and plan. This new lease was sold by auction to one Saltern, and the assignment to him is dated June 25, 1896. At or about the time of this sale by auction the fact of the occupation by Mrs. Triscott or the defendants of the premises in dispute in this action appears to have been first discovered, and in the assignment dated June 25, 1896, it is recited that the plan on the lease of 1894 was inaccurate, and the assignment is made "of so much of the land demised by the lease of December, 1894, as is in the occupation of Messrs. Goad" (which would not include the disputed portions), "or is now subject to the said lease." It is obvious that the trustee was unwilling to assert his title to the disputed pieces, but nevertheless he assigned such title to them as he had by the lease of 1894. Saltern renewed the lease of 1894 by taking a new lease from Lord Mount Edgcumbe dated July 7, 1898. This was done by the old description and plan, and no doubts or inaccuracy of the plan were recited. Then, on March 14, 1901, Saltern assigned to the present plaintiffs, who bought for the purpose of widening Phœnix Street; and they shortly afterwards, on July 18, 1901, commenced this action.

Thus the defendants and their predecessors in title to the beneficial interest in the foundry have had actual possession without acknowledgment of the disputed premises from 1848, when James Moir died. In 1896 the error was discovered; but even then no claim seems to have been made on the defendants: it appears to have been assumed that the error lay in the plans on the leases. Thus the period of undisputed possession seems to have been upwards of fifty-one years. During all that time the now disputed premises were, as between the persons beneficially entitled to the foundry property and those beneficially entitled to the stable property, treated as included in the foundry property and not in the stable property; but all the time Lord Mount Edgcumbe was receiving the rents to which he was entitled, and in every renewal was treating the disputed premises as part of the stable property.

Under these circumstances I should be glad to be able to decide the case by the doctrine commonly referred to as that of a lost grant—that is, the rule which says that on long-continued user or possession being proved anything requisite to give that user and possession a legal origin ought to be presumed by the Court. This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly. It is, in my opinion, a most useful doctrine, and enables the Court to avoid interfering with user and possession in cases not covered by the statutes of prescription and limitation, though within the mischief which these statutes were intended to remedy. In particular, it can be applied between termors when there is a difficulty in applying the statutes owing to the freeholder not being bound. In the present case there is no plea founded on this doctrine, but there is a plea that the defendants are in possession, which would be sufficient to raise any legal right to retain possession though not an equitable one. In this case it would be necessary, in order to justify the present possession of the defendants, to infer from the possession of their predecessors during the currency of leases now expired some binding engagement to give the benefit of the renewed lease which at the most would create a trust, so the point would not be open on the present pleadings without amendment. Further, there might be a difficulty owing to the fact that the stable property was until 1896 in trust, and probably the cestuis que trust were incapable of making a grant. I am by no means sure that these difficulties would be insuperable. There is a very wide arbitration clause in the settlement, and I am by no means sure that it would not be legitimate to infer an award settling the doubts arising on the construction of the settlement, and justifying the occupation which has taken place. But I feel that I ought not to decide the case on the ground of any such presumption, even if on a full consideration I thought it could be so decided, because the point has not been raised (probably for very good reason) by counsel for the defendants, and consequently I have not heard any arguments against it from the counsel for the plaintiffs, and moreover it is not open on the pleadings as they stand.

The defendants relied entirely on the Statute of Limitations for their defence, and the first point which has to be considered is when, if at all, the statute began to run against Lord Mount Edgcumbe, and in order to succeed the defendants must make out that it began to run at or before the making of the lease of August 27, 1856, for that lease subsisted until 1894—that is, until within twelve years before the action was commenced. This question seems to me to depend mainly on the character of the possession at that time of the disputed premises by the widow of John Moir, representing as she did Mrs. Triscott and her children. I am unable to come to the conclusion that there was any tenancy in fact existing to the trustees, and therefore the case of *Corpus Christi College, Oxford* v. *Rogers* (1), as explained in *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (2) (see per Lord Selborne (3)), does not apply. But I am equally unable to come to the conclusion that Mrs. Triscott and her brothers and sisters (in whose right Mrs. Moir was carrying on the business) were trespassers. In *Ecclesiastical Commissioners of England and Wales* v. *Rowe* (2), at the time of the surrender and regrant of the lease, the allotment in question was in the possession of a mere "trespasser and disseisor," as Lord Selborne said (4), and that possession could not possibly be considered to be the possession of the lessees who surrendered. Consequently, during the interval of time which the Lord Chancellor held must exist between the surrender and regrant, the allotment was being held against the lessor by the trespasser, and the right of action against him accrued to the lessor. In the case before me Mrs. Moir and her children were in possession of the foundry under the trusts of the settlement, and though in fact those trusts in their favour did not extend to the disputed parcels, yet Mrs. Moir clearly got the possession which she had of them by reason of her possession of the trust property. Under these circumstances the disputed parcels would, in my opinion, be held under the trust; they would devolve according to the trusts, and they would be an accretion to the trust property on the same grounds as they would be an accretion to the demised property if it were a case of tenancy. I think under these circumstances the proviso at the end of s. 7 of the Statute of Limitations (3 & 4 Will. 4, c. 27) applies, and that Mrs. Triscott cannot be considered a tenant at will to the trustees within the meaning of that section. Mr. Foote contended that the proviso only applied as regards land of which the trustee was in fact trustee of for the cestui que trust, and said by way of illustration that it could not apply if a man encroached in Middlesex on some land of a person who happened to be trustee for him of land in the county of Devon. That would be so; but in this case, where the possession is obtained by reason of the trust, I think it would be otherwise. It seems to me that when the trustee surrendered the stable lease in August, 1856, and took a new lease, he had the possession in law and effectually surrendered it to the lessor to enable him to make the regrant, as Lord Selborne says (1), out of his estate in possession just as much as he did when he surrendered in March, 1856, the lease of the foundry, of which Mrs. Triscott or her mother was then in the actual physical possession. Even if there were a tenancy at will, I am not sure that it would not be determined by her surrender, though created again after the regrant. It would be so determined, in my opinion, if the supposed tenant at will had notice of the surrender. I think, therefore, on these grounds that the statute did not begin to run against Lord Mount Edgcumbe in 1856.

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(1) 49 L. J. (Q.B.) 4.

(2) 5 App. Cas. 736.

(3) 5 App. Cas. at p. 743.

(4) 5 App. Cas. at p. 742.

This point is nearly the same as the second point raised by Mr. Upjohn, that the existence of the trust in itself prevented the statute running. This point he based on the cases of *Lister* v. *Pickford* (2) and *Knight* v. *Bowyer*. (3) I agree with

(1) 5 App. Cas. at p. 742.

(2) 34 Beav. 576.

(3) 2 De G. & J. 421.

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Mr. Foote that it is possible to distinguish each of those cases. In *Lister* v. *Pickford* (1) the trustees were themselves in actual receipt of the rents and profits; but they accounted for those rents to the wrong person. It was held that the persons for whom the trustees really were trustees were not barred by the erroneous payment, because a trustee could not by any act of his own make his rightful possession adverse to the real cestui que trust. Here the trustees were not in possession; so that case is not directly in point, though it is rather near to the present. Again, *Knight* v. *Bowyer* (2) proceeded on s. 25 of the statute as to express trusts. That section says that, when land is vested in a trustee on an express trust, the right of the cestui que trust, or any person claiming through him, to bring an action against the trustee, or any person claiming through him, shall be deemed to have accrued only when the land shall have been conveyed to a purchaser for valuable consideration, and then only as against such purchaser and any one claiming through him. Now, here there was an express trust of all the stable property, and the disputed parts were included in that trust. But the section only prevents the statute running in favour of persons claiming through the trustee otherwise than by purchase for value. Mrs. Triscott was certainly not a purchaser for value from the trustee; but it is not clear that she was a person claiming through the trustee. If she had been a mere stranger to the trust encroaching on the trust property and claiming adversely both to the trustee and the cestui que trust, the fact of the trust existing would not prevent the statute running in her favour. The question whether she was a person claiming through the trustee is nearly, if not quite, the same question as that which I have already discussed as to whether her possession could be considered the possession of the trustee for the purpose of the surrender; and if I am right in the view I have taken on that question, I think she must also be considered as a person claiming through the trustee within the meaning of s. 25. In fact, all these questions turn on whether Mrs. John Moir can be considered to have been for a year, prior to August, 1856, a tenant at will of the disputed premises to her trustee within the meaning of s. 7.

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(1) 34 Beav. 576.

(2) 2 De G. & J. 421.

Assuming, however, that the statute did begin to run in 1856 against Lord Mount Edgcumbe, so that he would be barred when his tenant of the stable property was barred, still the statute ran in favour of another tenant (or the cestui que trust of another tenant, which I think is the same thing) of the other property, and all the authorities shew that a presumption would arise that the encroachment was an accretion to the holding. The result therefore would, in my opinion, be that, if Lord Mount Edgcumbe had a right of entry in August, 1856, on these two disputed parcels, these parcels would, when the statute ran out, be presumed to be held with the foundry property, and when that lease determined or was surrendered he could resume possession. That lease did not determine until July 24, 1890, or shortly before, when the third life is said to have dropped. He would then have acquired a new right of possession, and it would be within twelve years of this action, unless the third life dropped before July 18, 1889. Mr. Foote answers this point as to accretion to the tenancy by referring to the observations of all the Lords Justices in *Attorney-General* v. *Tomline* (1), to the effect that this presumption of accretion to the holding is a question of fact, and if on the facts proved in any particular case the landlord and tenant are shewn to have "so conducted themselves as to shew that the landlord treated the encroachment as not enuring for his benefit," then the presumption would be rebutted. I quote from the judgment of Thesiger L.J. at end of p. 161; but the language of the other Lords Justices is quite to the same effect. In that case it was said that, even if the presumption applied to copyholds, the surrender of the original holding and the regrant of it without the encroachment would be sufficient to rebut the presumption. That was in many respects a very different case to the present; but, adopting Thesiger L.J.'s words, I am quite unable to come to the conclusion that Lord Mount Edgcumbe ever recognised this encroachment as not enuring for his benefit. I am convinced that neither he nor his advisers (who probably alone knew anything at all of the matter) ever for one moment recognised any independent title in Mrs. Triscott to these portions of the property. In all probability they assumed without inquiry that she was surrendering to Lord Mount Edgcumbe all she held; and although Lord Mount Edgcumbe cannot be in a better position owing to his ignorance than he otherwise would be, yet he cannot be assumed to have voluntarily given up any of his rights presumptive or otherwise. Assuming, however, as probably I ought to assume, that he knew the facts as to Mrs. Triscott's occupation, and knew that in consequence he was in a position to claim that she had, during the term which was being surrendered, held the portions now in dispute as an addition to her proper holding, I do not think he was in a position to regrant them to her; and therefore his not including them in the renewed lease raises no presumption that he did not intend to treat them as having been added to her former holding while it continued. On his acquiring from Mrs. Triscott on the surrender of her term the right to the possession of these portions, the holder of the stable lease would, as it seems to me, become again entitled to them as against Lord Mount Edgcumbe; and in fact he so dealt with the matter, for in 1894 he regranted the whole of the original stable property including these pieces to Taylor. I do not think the fact that during the currency of the lease of 1856 the owners of the stable lease had lost the right to recover these pieces from Mrs. Triscott, and had thereby enabled her to add them to the holding as between herself and Lord Mount Edgcumbe, would have at all prevented their claiming the possession of them again from Lord Mount Edgcumbe when he acquired them from Mrs. Triscott at the expiration of the lease of March, 1856. In fact, Lord Mount Edgcumbe's right to the disputed pieces on the determination of the foundry lease would automatically vest in the owner of the stable lease. That being so, it does not seem to me that anything happened at the expiration or surrender of that term which rebuts the presumption that during the term these pieces were held under it. I think, therefore, that at this time Lord Mount Edgcumbe acquired the right to the possession, and his leases of 1894 and 1898 were good leases.

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(1) 15 Ch. D. 150.

That being so, I hold, first, that no right of entry accrued to Lord Mount Edgcumbe in 1856, and that on that view his right first accrued on the surrender of his stable lease in December, 1894; secondly, if I am wrong on that, and he did acquire a right of entry in 1856 so that the statute then began to run against him, the effect of its so running was to add the disputed pieces to the foundry lease, so that as against Mrs. Triscott he acquired a new right on the determination of that lease in July, 1890, or shortly before that date, when the third life dropped; and whichever of those views is correct, the Statute of Limitations does not bar this action by the plaintiffs unless that third life dropped before July 18, 1889.

It is not very satisfactory that I should have to give judgment in this case, which will probably go to the Court of Appeal and possibly to the House of Lords, without the date of the determination of the lease of March, 1856, having been proved; but I understand from counsel that, although the fact is known, there is some difficulty in putting before me an admission as to it on which I can act. Under the circumstances, I can only deal with the case upon the footing that the statements in the lease of July, 1890, are correct, and that the former lease subsisted until immediately before the grant of the new lease.

I therefore give judgment for the plaintiffs for possession. There is no claim for mesne profits. Of course, costs will follow.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Crowders, Vizard & Oldham, for R. Robinson Rodd, East Stonehouse.*

Solicitors for defendants: *Ravenscroft, Woodward & Hills, for Rooker, Matthews, Harrison & Matthews, Plymouth.*

F. O. R.

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May 10;
June 14.

Criminal Law—Conspiracy—Indictment against two or more for conspiring together—Plea of Guilty by one—Acquittal of the others—Withdrawal of Plea of Guilty before Sentence—Jurisdiction to allow Withdrawal—The Crown Cases Act, 1848 (11 & 12 *Vict. c.* 78).

On the trial of an indictment charging three persons jointly with conspiring together, if one pleads guilty and has judgment passed against him, and the other two are acquitted, the judgment passed against the one who pleaded guilty is bad and cannot stand.

A question arising upon a plea of guilty is a question arising "on the trial" within 11 & 12 Vict. c. 78, and the Court for the Consideration of Crown Cases Reserved has power to entertain a case reserving that question, and to make such order as justice may require.

Reg. v. *Brown*, (1889) 24 Q. B. D. 357, followed.

Reg. v. *Clark*, (1866) L. R. 1 C. C. 54, disapproved.

Where a prisoner has pleaded guilty to an indictment, the Court has jurisdiction to allow him, before sentence, to withdraw his plea and plead not guilty.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of the Berkshire Quarter Sessions.

At a quarter sessions held for the county of Berks, R. E. Plummer, the present defendant, and William Fenton and Charles Wheeler were tried on an indictment containing six counts for obtaining money by false pretences, and for conspiring to defraud the Thames Conservators.

The first five counts of the indictment referred to false pretences, and are not material to the present case. The sixth count charged Plummer, Fenton, and Wheeler that, on certain days and times specified in the count, they "unlawfully, fraudulently, and deceitfully did among themselves conspire, combine, confederate, and agree together by divers false pretences and unlawful and subtle ways, means, stratagems, and devices to obtain and acquire to themselves of and from the Conservators of the River Thames divers large sums of money of the moneys of the said Conservators of the River Thames, and to cheat and defraud them thereof to the evil example of all others in the like manner offending, and against the peace of our Lord the King, his crown and dignity."

At the trial the defendant Plummer pleaded "not guilty" to the first five counts of the indictment, and "guilty" to the sixth count. A verdict of not guilty was returned in his favour upon the first five counts. He was subsequently called as a witness for the prosecution against Fenton and Wheeler. Fenton and Wheeler pleaded "not guilty" to the whole indictment, and were found by the jury not guilty upon the whole indictment. Immediately after the verdict of not guilty was recorded in favour of Fenton and Wheeler, the counsel who appeared for Plummer submitted that Plummer could not be convicted and punished, and that no further step could be taken upon the indictment, and claimed that Plummer should be acquitted.

The chairman considered this contention untenable, and so intimated; whereupon Plummer's counsel asked for leave to withdraw the plea of guilty which had already been entered for Plummer, and in place thereof to enter a plea of not guilty. The chairman refused to grant the application, considering that he had no power to grant it. After giving his decision he passed sentence upon Plummer, but respited the sentence, and admitted Plummer to bail pending the hearing of this case by the Court for the Consideration of Crown Cases Reserved.

The questions for the opinion of the Court were:—

1. Whether in the aforesaid circumstances a conviction could be recorded and judgment passed upon Plummer:

2. Whether the Court of quarter sessions had jurisdiction to permit Plummer to withdraw his plea and enter a plea of not guilty:

3. If the Court of quarter sessions was wrong in giving judgment and passing sentence, then what course ought to have been taken.

Dickens, K.C., for the defendant. The ruling of the chairman of quarter sessions was wrong, and the conviction of Plummer ought to be quashed. The law is clear that, when several persons are tried together on a joint indictment for conspiracy, and one is convicted and the rest acquitted, the conviction of the one is bad, because the record when made up on the indictment is repugnant and inconsistent on the face of it: *Harison* v. *Errington* (1); *Rex* v. *Sudbury* (2); 2 Hawk, P. C. 8th ed. c. 47, pp. 621, 622; *Reg.* v. *Manning* (3); Chitty's Criminal Law, vol. iii. 1141, where the cases are summed up and the result of them stated. It is true that sentence may be passed on a defendant who is convicted of conspiring with another named person included in the same indictment who has not yet been tried: *Rex* v. *Cooke* (4); *Reg.* v. *Ahearne* (5); but if that other be subsequently tried and acquitted, the judgment against the first falls to the ground. Judgment against an accessory passed during the attainder of the principal was held good during the attainder, but on the reversal of the attainder of the principal was said to be "without any writ of error utterly cancelled; for by the reversal of the attainder against the principal the attainder of the accessory, which depends on the attainder of the principal, ipso facto is utterly defeated and annulled": see *Lord Sanchar's Case.* (6) All the cases establish that the state of the record as it is made up upon the indictment is what must be looked at, and if it shews that, where there is one indictment against A., B., and C. for conspiring together, and that A. has been convicted of the conspiracy, whilst B. and C. have been acquitted, there is a repugnancy on the record, and the conviction of A. cannot stand. It is immaterial how the conviction came about—whether by a plea of guilty or by the verdict of a jury. Every man is supposed to know the law, and by pleading guilty to that which cannot be an offence at law a person does not render himself liable to judgment.

Next, the chairman of quarter sessions was wrong in thinking that he had no jurisdiction to allow the defendant Plummer to withdraw his plea of guilty and plead not guilty. It is clear that there was jurisdiction before sentence was passed: *Reg.* v.

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(1) (1365) Popham, 202.

(2) (1698) 12 Mod. 262.

(3) (1883) 12 Q. B. D. 241.

(4) (1826) 5 B. & C. 538.

(5) (1852) 6 Cox, 6.

(6) (1612) 9 Co. Rep. 207, at pp. 215, 216.

Sell (1); *Reg.* v. *Clouter and Heath.* (2) The case of *Reg.* v. *Brown* (3), distinguishing *Reg.* v. *Clark* (4), shews that a plea of guilty raises no estoppel against the prisoner so as to prevent him from raising, on a case stated, the question whether he could be convicted on the indictment preferred against him. The Court will not give judgment if on the whole case it is satisfied that the prisoner was not guilty of any offence, notwithstanding that the prisoner waives the point: *Rex* v. *Waddington.* (5)

H. C. Biron and *W. Frampton* appeared to watch the case for the Thames Conservators, but were not instructed to argue.

Cur. adv. vult.

June 14. The following judgments of the Court (Lord Alverstone C.J., Wright, Bruce, Darling, and Jelf JJ.) were delivered, the judgments of Wright and Bruce JJ. being written:—

Wright J. The appellant and two other persons were indicted together upon an indictment which contained five counts charging the obtaining of money by false pretences, and also a sixth count alleging a conspiracy between the three defendants to defraud the prosecutors. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were included in one arraignment. All pleaded not guilty to the five counts; the appellant pleaded guilty to the sixth count, the other defendants pleading not guilty to that count as well as to the five. Thereupon, it is stated in the case, a verdict of not guilty was returned in favour of the appellant on the first five counts, and the trial of the other defendants proceeded; and the appellant was called as a witness against them. We must, therefore, infer that the appellant was given in charge to the jury upon the five counts in order that, no evidence being offered against him upon those counts, the jury might find a verdict in his favour upon them.

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(1) (1840) 9 C. & P. 346.

(2) (1859) 8 Cox, 237.

(3) 24 Q. B. D. 357.

(4) L. R. 1 C. C. 54.

(5) (1800) 1 East, 143; 6 R. R. 238.

The jury acquitted the other defendants upon all the six counts. Counsel for the appellant thereupon claimed that no judgment could pass upon the appellant in respect of his plea of guilty to the count for conspiracy, inasmuch as the jury by their verdict in favour of the only other alleged parties to the conspiracy had negatived any conspiracy.

So far as we have been able to discover, there is no reported precedent which on the facts is exactly in point. There is much authority to the effect that, if the appellant had pleaded not guilty to the charge of conspiracy, and the trial of all three defendants together had proceeded on that charge, and had resulted in the conviction of the appellant and the acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant, because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him: see *Harison* v. *Errington* (1), where upon an indictment of three for riot two were found not guilty and one guilty, and upon error brought it was held a "void verdict," and said to be "like to the case in 11 Hen. 4, c. 2, conspiracy against two, and only one of them is found guilty, it is void, for one alone cannot conspire." So in *Rex* v. *Sudbury* (2), where only two out of three were found guilty of riot, and there was no allegation of cum aliis, the judgment was arrested. So in Chitty's Criminal Law, vol. iii. p. 1141, on the authority of those cases, "the conviction . . . . will be invalid, and no sentence can be passed." So in *Reg.* v. *Thompson* (3), per Lord Campbell C.J.: "the acquittal of two involves the acquittal of the third." In *Reg.* v. *Manning* (4) this doctrine was, perhaps, somewhat extended. There two persons were put on their trial together at Nisi Prius for a conspiracy, no other parties being alleged. The jury convicted one with the sanction of the judge, although they were unable to agree and were discharged as to the other, and upon a rule moved for a new trial it was held by Lord Coleridge C.J. and Mathew and Stephen JJ. that there had been a misdirection. The

(1) Popham, 202.

(2) 12 Mod. 262.

(3) (1851) 16 Q. B. 832, at p. 844.

(4) 12 Q. B. D. 241.

issue, Mathew J. said, was whether both were guilty, and the jury had not agreed on that issue. It is true that the judgments in *Reg.* v. *Manning* (1) purport to be based mainly on an opinion of the judges in *O'Connell and Others* v. *Reg.* (2), which does not seem to us to affect the present question; but the decision itself is in accordance with the previous authorities, which appear to establish that the mere possibility of the one defendant having been acquitted by reason of evidence not being forthcoming or admissible against him, which was forthcoming or admissible against the other who has been tried with him, is not enough to cure the inconsistency apparent on the record. It is equally clear, on the other hand, that if the appellant had been arraigned and tried alone for the conspiracy and had been convicted, his conviction would have been good at the time and judgment could have been pronounced against him, although the other persons included in the indictment had not appeared, or were dead, or the trial of them had been postponed: see Brooke's Abr. "Conspiracy," p. 21; *Rex* v. *Nichols* (3); *Rex* v. *Scott* (4); *Rex* v. *Cooke* (5); *Reg.* v. *Ahearne* (6), in which case, however, it is difficult to see how this question really arose at all, since the indictment was not for a mere conspiracy to murder but for actual murder, though laid with an averment of conspiracy, as appears from the sentence of death as reported in 2 Ir. C. L. 381. It is, however, not clearly settled whether in such a case of separate trials a subsequent acquittal of the other would not avoid the effect of the previous conviction of the appellant. So, if in the present case the appellant had been sentenced, as he might have been, immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed; but it is not certain whether upon the acquittal of the other defendants the sentence upon him must not have been vacated or treated as erroneous, just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but was ipso facto avoided when the attainder was removed: 1 Hale, P. C. 625; *Lord Sanchar's Case*. (1) In *Rex* v. *Cooke* (2) Littledale J. suggested that a similar consequence might follow from an acquittal of the alleged co-conspirator at his own separate trial; and the same suggestion is made in the head-note to *Reg*. v. *Ahearne* (3), though not so distinctly in the judgments. This suggestion is questioned by Mr. Greaves in Russell on Crimes, 4th ed. vol. iii. p. 146, but on grounds which would be to a large extent equally applicable to the case of a joint trial, and are therefore insufficient upon the authorities which have been cited. The present case may be regarded as intermediate between the case of a wholly joint trial and the case of separate trials of the alleged co-conspirators. The appellant and his co-defendants were jointly indicted; they were arraigned together; they all pleaded not guilty to the five principal counts; there was only one venire; they were all apparently given in charge (as I have pointed out) to the same jury. If error had been brought, one record would have been made up (as in *Lord Sanchar's Case* (1), where the plea of guilty by one prisoner and the verdict of the jury as to the other are set out), and the same record would have shewn the inconsistent plea and verdict. We think that, under these circumstances, the trial ought to be regarded as in substance joint, and that the plea of guilty ought not to be followed by judgment. There is an authority to this effect which, although it has not the effect of a decision, we cannot disregard. The very case is put in *Robinson* v. *Robinson* (4), where Cockburn C.J. says: "The case of an indictment against two persons for conspiracy suggested an apparent analogy, and as, in such a case, a plea of guilty by the one, if followed by the acquittal of the other, would not have supported a judgment of guilty against the delinquent confessing and pleading guilty, so it might be said that here," &c. This passage is indeed treated by one of the judges in *Reg*. v. *Manning* (5) as a "mere dictum"; but in truth it was this very analogy which the Court in *Robinson* v. *Robinson* (4) had to consider and reject or adopt, and it forms part of a considered judgment of Cockburn C.J., Wightman J., and Sir C. Cresswell—no mean authorities on the criminal law. It seems also to be supported by the language of Lee C.J. in *Rex* v. *Nichols* (1), who said: "One being acquitted on record, the conviction of his companion on the same record must be directly repugnant and contradictory to the other"; and there is nothing in the context to exclude the application of this language to a conviction on a plea of guilty. Even apart from the conclusion of strict law at which we have arrived, we think that the unfettered power which the statute 11 & 12 Vict. c. 78 (2) confers upon this Court to make such order as justice may require might in this case be exercised in favour of the appellant, who has been acquitted of the more serious charges alleged in the indictment, and who in pleading guilty to the minor charge may have done so under misapprehensions of various kinds, and who certainly did not plead guilty to any separate offence. And so, before the statute, in *Rex* v. *Waddington* (3) it was said that, even where a convicted prisoner waived his motion in arrest of judgment, the Court would not pass sentence if they could see that no crime was shewn.

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(1) 12 Q. B. D. 241.

(2) (1844) 11 Cl. & F. 155, at pp. 236–7.

(3) (1742) 13 East, 412, n.; 12 R. R. 388.

(4) (1761) 3 Burr. 1262.

(5) 5 B. & C. 538.

(6) 6 Cox, 6.

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(1) 9 Co. Rep. 207, at pp. 215, 216.

(2) 5 B. & C. 538.

(3) 6 Cox, 6.

(4) (1859) 1 Sw. & Tr. 362, at pp. 392, 393.

(5) 12 Q. B. D. 241.

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(1) 13 East, 412, n.; 12 R. R. 388.

(2) 11 & 12 Vict. c. 78, s. 1, provides: "When any person shall have been convicted of any treason, felony, or misdemeanour before any Court of oyer and terminer or gaol delivery, or Court of quarter sessions, the judge or commissioner, or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either Bench and Barons of the Exchequer" (now the Court for the Consideration of Crown Cases Reserved).

Sect. 2 provides that the judge or commissioner or Court of quarter sessions shall thereupon state in a case the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and Barons; "and the said justices and Barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that in the judgment of the said justices and Barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require."

(3) 1 East, 143, at pp. 146, 159; 6 R. R. 238.

Another point is raised in this case, namely, whether the Court had power to allow the appellant to withdraw his plea of guilty. There cannot be any doubt that the Court had such power at any time before, though not after, judgment: see, e.g. *Reg.* v. *Clouter and Heath* (1); *Reg.* v. *Sell* (2); and, as we infer that but for the erroneous opinion that there was no such power the withdrawal would have been allowed, this might of itself be a ground for a venire de novo: *Reg.* v. *Yeadon* (3), the indictment being for a misdemeanour.

Lastly, it is necessary to observe that, in entertaining this case, notwithstanding that the appellant pleaded guilty, we adopt the construction of the Act which commended itself to the Court in *Reg.* v. *Brown* (4) in preference to the decision in *Reg.* v. *Clark* (5), where it was held that a question arising upon a plea of guilty was not a question arising upon a trial.

BRUCE J. I agree with the judgment of Wright J. and with the reasons he has given. I do not propose to go through the authorities cited by him, but I wish to make a few observations of my own tending to the same conclusion on somewhat different grounds. I think that the statement in Chitty's Criminal Law, 2nd ed. vol. iii. p. 1141, is correct, and is fully supported by the authorities. The statement is as follows: "And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him." That passage seems to me to apply exactly to the present case. The point of the passage turns upon the circumstance that the defendants are included in the same indictment, and I think it logically follows from the nature of the offence of conspiracy that, where two or more persons are charged in the same indictment with conspiracy with one another, and the indictment contains no charge of their conspiring with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a jury or upon his own confession, because, as the record of conviction can only be made up in the terms of the indictment, it would be inconsistent and contradictory and so bad on its face. The gist of the crime of conspiracy is that two or more persons did combine, confederate, and agree together to carry out the object of the conspiracy. To quote from Sir William Erle (Erle on Trades Unions, p. 31): "With respect to the crimes classed under the term 'conspiracy,' the external act of the crime is concert, by which mutual consent to a common purpose is exchanged." Where the indictment charges that A., B., and C. combined, confederated, and agreed together to do a certain thing, and A. and B. are acquitted by the verdict of a jury from the charge, it is inconsistent with that finding that there could have been any combination, confederation, and agreement between them and C.; and unless they combined, confederated, and agreed together with C., C. cannot be found guilty of the charge. It seems to me that it matters not whether the trial of A., B., and C. took place at the same time or not, so long as they are charged upon one indictment. Only one record can be drawn up based upon that indictment. If the proceedings have taken such a course as to negative mutual consent to a common purpose by all but one of the parties who are alleged to have conspired together, no valid record of a conviction against that one can be drawn up. If the record finds that A. and B. are acquitted on a charge of agreeing together with C., the same record cannot without inconsistency find that C. agreed together with A. and B. As to the note by Mr. Greaves in Russell on Crimes, 4th ed. vol. iii. p. 146, referred to in the judgment of Wright J., where it is suggested that a verdict of not guilty is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. If it is to be applied at all, it would apply to persons tried at the same time, and yet it is perfectly clear upon the authorities that, if two persons are tried together upon a charge of conspiring with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to establish the charge against the person who was acquitted. There is another point in the case. It is clear that the Court had power to allow the appellant to withdraw his plea of guilty. The Court no doubt had a discretion in the matter, and, if the Court had exercised its discretion, it may be that that would be final and we should have no power to interfere with the exercise of its discretion. But the Court, acting upon the erroneous opinion that it had no power to allow the withdrawal of the plea, never did exercise its discretion. If it had exercised its discretion, it is quite possible that it might have allowed the withdrawal of the plea, and, if it had allowed the withdrawal of the plea of guilty and allowed the appellant to plead not guilty, and he had been tried by the same jury who acquitted the other defendants, or by another jury, it is quite possible that he would have been acquitted. The appellant has been deprived of this chance of acquittal by reason of a mistake of the Court. I think every intendment should be made in favour of an accused person, and, as the Court by reason of a mistake as to the extent of its powers did not exercise a discretion which it might have exercised in favour of the appellant, the appellant is, I think, entitled on that ground alone to have the conviction set aside.

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(1) 8 Cox, 237.

(2) (1840) 9 C. & P. 346.

(3) (1861) 1 Le. & Ca. 81; 31 L. J. (M.C) 70.

(4) 24 Q. B. D. 357.

(5) L. R. 1 C. C. 54.

DARLING J. I agree with the judgment delivered by my brother Wright, and I have nothing to add except that I desire to emphasize what he has said as to the power of this Court, acting within the discretion given to us by the statute,

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to make such order as justice may require in cases reserved for our consideration such as this.

Lord Alverstone C.J. My brother Jelf and I have felt considerable difficulty on the first point reserved for the consideration of the Court, because the objection taken on behalf of the defendant appeared to a certain extent to be technical; but we are unable to answer the very learned and able judgments which have been delivered by Wright and Bruce JJ. We concur in those judgments because we are unable to give satisfactory reasons for adopting a contrary view. In so concurring we place great reliance on the fact that there was a joint trial on one indictment charging the three defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons. On the second point, we entirely concur in the judgments of Wright and Bruce JJ. I desire to add that I agree with the view taken in those judgments as to the power of this Court to make such order as justice may require. I also desire to say that I agree with the view taken by the Court in *Reg.* v. *Brown* (1) with respect to the effect of a plea of guilty to what could not be an offence, and I think it is to be preferred to that taken in *Reg.* v. *Clark.* (2)

Conviction quashed.

Solicitors for defendant: *Rooke & Sons, for Brain & Brain, Reading.*

Solicitor for prosecutors: *Solicitor of the Thames Conservancy.*

(1) 24 Q. B. D. 357.

(2) L. R. 1 C. C. 54.

W. A.

BUDD-SCOTT *v.* DANIELL.

1902
June 18.

Landlord and Tenant—Agreement to Let—Quiet Enjoyment, Implied Undertaking for—Breach.

Upon the letting of a house for a year, an undertaking by the lessor for quiet enjoyment is to be implied from the mere relation of landlord and tenant.

Bandy v. *Cartwright*, (1853) 8 Ex. 913, and *Hall* v. *City of London Brewery Co.*, (1862) 2 B. & S. 737, followed.

Dicta of Kay L.J. in *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, dissented from.

Whether there has, or has not, been a breach of a covenant or undertaking for quiet enjoyment is a question of fact in each case.

Appeal from the Brighton County Court.

By a memorandum of agreement not under seal the plaintiff thereby "agreed to let," and the defendant thereby agreed to take, a furnished house for a year. The memorandum contained no other words of letting, and no express contract for quiet enjoyment. At the date of the agreement the plaintiff was under an obligation, by the provisions of a private Act of Parliament, to paint the outside of the house during that year. On the plaintiff's default, the Commissioners under the private Act were empowered to do the work. The county court judge found that the plaintiff, when she let the house, had forgotten that it was the year in which the painting had to be done.

The defendant having gone into possession under the agreement, notices, addressed to the plaintiff, were served on the defendant as occupier requiring the painting to be done. The county court judge found that, under pressure from the plaintiff or her agent, the defendant consented to the painting being done. He also found that the painting of the house rendered it necessary for the defendant and her family to leave the house for about a fortnight.

In an action brought by the plaintiff, at the expiration of the tenancy, for dilapidations, the defendant counter-claimed for damages for breach of an implied covenant for quiet enjoyment.

The county court judge, after reviewing the authorities, came to the conclusion that he was bound by the opinion of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (1) to hold that, as the tenancy agreement did not contain the word "demise," no covenant for quiet enjoyment could be implied. He also said that, taking that view, it was unnecessary for him to determine the question of fact whether there had been a breach of the supposed implied covenant. If the defendant was entitled to recover, he assessed the damages at 15*l*. He gave judgment for the plaintiff on the counter-claim.

The defendant appealed.

E. E. Humphrys, for the defendant. From the words "agrees to let" in this memorandum a covenant for quiet enjoyment is to be implied: *Bandy* v. *Cartwright* (2); *Hall* v. *City of London Brewery Co.* (3) "It is clear that from the word 'demise' in a lease under seal the law implies a covenant, in a lease not under seal a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let' or any equivalent words (Shep. Touchstone, 272) which constitute a lease have no doubt the same effect, but not more: Shep. Touchstone, 165, 167": *Hart* v. *Windsor* (4), per Parke B.; see also *Mostyn* v. *West Mostyn Coal and Iron Co.* (5), per Brett J.; *Robinson* v. *Kilvert* (6), per Lindley L.J.; *Baynes & Co.* v. *Lloyd & Sons* (7), per Lord Russell C.J. Lord Russell's decision in that case, which was that such an implied covenant determined with the interest of the lessor, was affirmed by the Court of Appeal (1); but Kay L.J. expressed the opinion that a covenant for quiet enjoyment can only be implied when the word "demise" is used in the lease. The authorities cited by Kay L.J. in support of that view do not really establish it. The passages which he refers to from Sheppard's Touchstone and from Bacon's and Viner's Abridgements, although they

(1) [1895] 2 Q. B. 610.

(2) 8 Ex. 913.

(3) 2 B. & S. 737.

(4) (1843) 12 M. & W. 68, at p. 85.

(5) (1876) 1 C. P. D. 145, at p. 152.

(6) (1889) 41 Ch. D. 88, at p. 96.

(7) [1895] 1 Q. B. 820, at pp. 825, 826.

state that a covenant is to be implied from the words "demise" or "grant," "demisi" or "concessi," do not limit the implication of a covenant to the use of those words only. And in *Nokes's Case* (1), which is one of the authorities he cites in support of his proposition, the covenant is said to arise on the words "demise, grant, *&c.*" The opinion of Kay L.J. was in no way necessary to the decision of the case, and is, therefore, not binding; and the balance of authority is in favour of the opposite view. [He also cited *Penfold* v. *Abbott.* (2)]

[CHANNELL J. I see that Kay L.J. refers to 8 & 9 Vict. c. 106. But if *Bandy* v. *Cartwright* (3) and *Hall* v. *City of London Brewery Co.* (4) are right, the implied contract arises from the fact of the letting, and a statute as to the construction of deeds cannot affect that.]

Then, secondly, there was a breach of the implied covenant. In *Sanderson* v. *Berwick-upon-Tweed Corporation* (5) Fry L.J. said: "It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected." That was cited with approval by Lindley L.J. in *Robinson* v. *Kilvert.* (6) Here the county court judge has found that the painting rendered it necessary for the defendant to leave the house for a fortnight. That is conclusive as to the enjoyment of the demised premises having been substantially interfered with.

H. Jacobs, for the plaintiff. The case of *Bandy* v. *Cartwright* (3) is no authority upon this question. There is nothing to shew that the letting there was not by the word "demise." It is simply a decision that in a case where a covenant would be implied in a deed it will be implied in an agreement not under seal. In *Hall* v. *City of London Brewery*

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(1) (1598) 4 Rep. 80 b.

(2) (1862) 32 L. J. (Q.B.) 67.

(3) 8 Ex. 913.

(4) 2 B. & S. 737.

(5) (1884) 13 Q. B. D. 547.

(6) 41 Ch. D. 88.

Co. (1) the Court supposed that the question had been decided in *Bandy* v. *Cartwright* (2), and simply followed that case. The observations in *Hart* v. *Windsor* (3) and *Mostyn* v. *West Mostyn Coal and Iron Co.* (4) are admittedly dicta only. All these cases were dealt with in the considered judgment of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (5), where the first question dealt with in the written judgment of the Court is whether any covenant could be implied from the words "agree to let" or from the mere relation of landlord and tenant, and the Court did really decide that question in the negative, holding that the word "demise" is necessary to raise the implication. There are many instances of the law giving a special effect to particular words, as, for example, by the Conveyancing Act, 1881. A covenant for title will only be implied where the word "demise" is used: see per Lord Russell C.J. in *Baynes & Co.* v. *Lloyd & Sons.* (6) The covenant for quiet enjoyment is a limited covenant for title, and must either be expressed, or will only be implied from the use of the special word that the common law has invested with this exceptional effect. [He also referred to *Messent* v. *Reynolds* (7) and Platt on Covenants, p. 46.]

Secondly, if such a covenant is implied, there was here no breach of it. A covenant for quiet enjoyment is a covenant for title, and has never been held to cover a nuisance. In *Manchester, Sheffield and Lincolnshire Railway* v. *Anderson* (8) Lindley M.R. says: "A temporary inconvenience which does not interfere with the estate or title or possession is not, to my mind, a breach of covenant, nor is there any case that goes anything like the length required to shew that it is. Even the judgment of Fry L.J. in the case that carried it farthest, *Sanderson* v. *Berwick-upon-Tweed Corporation* (9), in which he says that anything which substantially interferes with the enjoyment by the tenant is a breach of that covenant, must be taken with reference to the facts then before the Court, which were that water was poured on the land demised so as to interfere with the enjoyment of the demised property." There must be an actual dispossession adverse to the tenant. Here there was no dispossession. The tenant could have remained in the house, and the county court judge has found that she consented under pressure to what was done. Further, what was done was done in pursuance of a statutory obligation. Where there is a public duty to be performed, the performance of it cannot be a breach of covenant. If the landlord had not done the work, the Commissioners under the Act would have done it. The work is done under the Act of Parliament in the one case as much as in the other, and the statutory duty is an answer to any action in respect of the work. [He also cited *Howard* v. *Maitland*. (1)]

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(1) 2 B. & S. 737.
(2) 8 Ex. 913.
(3) 12 M. & W. 68.
(4) 1 C. P. D. 145.
(5) [1895] 2 Q. B. 610.
(6) [1895] 1 Q. B. 820, at p. 825.
(7) (1846) 3 C. B. 194.
(8) [1898] 2 Ch. 394.
(9) 13 Q. B. D. 547.

E. E. Humphrys, in reply. The Act of Parliament which required the painting to be done was in force at the time when the house was let, and the fact that the plaintiff had forgotten it will not relieve her from liability: see *Baily* v. *De Crespigny*. (2) There was no voluntary consent in this case. The defendant was told the work had to be done, and she submitted to what she could not avoid by going out, when, as the judge has found, it was necessary that she should leave.

LORD ALVERSTONE C.J. This case is not free from difficulty. The question is which of the lines of argument put forward by the one side and the other ought to be followed. For example, if the rule of law is that the word "demise" must be used if a covenant for quiet enjoyment is to be implied, then that word is absent here, and the case could be decided on that ground. The law has in many cases, of which it is unnecessary to give instances, given a particular effect to particular words. In the present case it is said, on the one hand, that the common law has given this special meaning to the word "demise," and to that word alone. On the other hand, it is said that the covenant or contract which it is sought to imply is not dependent on the word "demise," but arises from the relationship of landlord and tenant. Apart from authority

(1) (1883) 11 Q. B. D. 695.

(2) (1869) L. R. 4 Q. B. 180.

it would certainly seem, on principle and in common sense, that when one person agrees to give possession of his house for a time to another, that ought to carry with it an agreement that he, the landlord, and those claiming through him, will not dispossess the tenant during that time. Therefore, unless there is some special meaning attached to the word "demise," the good sense of the thing would seem to be that, upon an agreement to let, a covenant or contract was to be implied that the landlord and those claiming under him would not disturb the possession of the tenant. Unless driven to do so by authority, I should hesitate a long time before drawing any distinction in that respect between the words "agree to let" and "demise." It is true that in *Baynes & Co.* v. *Lloyd & Sons* (1) Kay L.J. did say: "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease." Looking back at the authorities he cited, I should not myself have come to the same conclusion. No doubt it would be right to say that the authorities are not altogether consistent on the point; but to say that the weight of authority is as Kay L.J. states it to be is a proposition to which I certainly should not be prepared to assent. In *Line* v. *Stephenson* (2), where it was held that the covenant implied in the word "demised" is qualified by an express covenant for quiet enjoyment, it was no doubt said that a covenant for quiet enjoyment was to be implied from the use of the word "demised"; but I do not think that Lord Denman intended to limit the implication to the use of that word alone. Then there is the case of *Bandy* v. *Cartwright.* (3) Apart from the criticism of Kay L.J. that it was to be assumed that the word "demised" was there used, I think that the decision in that case is an authority in favour of the defendant. I think that the judgment proceeded on the theory that the relationship of landlord and tenant does of itself raise an implied contract by the landlord for the quiet enjoyment of the tenant. Pollock C.B. said: "In this case the plaintiff sued upon what he described in his declaration to be a covenant for quiet enjoyment and for good title. It appeared that the defendant had demised the land in question to the plaintiff at a given rent by parol, but there was no actual covenant, and therefore there was only that covenant which the law would imply. We are of opinion that that is not a covenant for good title but for quiet enjoyment only during the term." It may, of course, be that the word "demise" was used in the parol lease, though it is nowhere so stated in the report, and it may be that Pollock C.B. meant to refer to the use of that word; but I cannot help thinking that, if he had so intended, he would have used different language. His judgment was certainly not so understood in *Hall* v. *City of London Brewery Co.* (1), because, in that case, Cockburn C.J. said: "We cannot overrule *Bandy* v. *Cartwright* (2); and it is inconsistent with common sense that, when a man is let into possession for a year, a promise by the lessor for quiet enjoyment against himself and all that claim by title under him should not be implied." The Chief Justice is not there treating *Bandy* v. *Cartwright* (2) as turning on the use of the word "demise," and his reasoning occurs in a case in which all the authorities on the question were cited and discussed. In giving judgment he said: "*Bandy* v. *Cartwright* (2) is a direct authority that a contract for quiet enjoyment is implied in a contract of demise, and I think that case is good law." To say "in a contract of demise" is, of course, very much wider than to say "in a contract in which the word 'demise' is used." In *Mostyn* v. *West Mostyn Coal and Iron Co.* (3) Lord Esher (then Brett J.) said: "I think the case of *Line* v. *Stephenson* (4) is an authority to shew that where an indenture of lease contains the word 'demise,' then if there be no express covenant either for title or for quiet enjoyment, there is an implied covenant that the lessor has a good title, and that the lessee shall have quiet enjoyment. . . . . *Hart* v. *Windsor* (5) is an authority that the word 'let' has the same

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(1) [1895] 2 Q. B. 610, at p. 615.

(2) (1838) 5 Bing. N. C. 183.

(3) 8 Ex. 913.

(1) 2 B. & S. 737.

(2) 8 Ex. 913.

(3) 1 C. P. D. 145, at p. 152.

(4) 5 Bing. N. C. 183.

(5) 12 M. & W. 68.

effect in this respect as the word 'demise,' and that any other equivalent word would have the same effect." Then, in *Robinson* v. *Kilvert* (1), Lord Lindley (then Lindley L.J.) undoubtedly expressed the view that, where there was an agreement for a lease, a covenant for quiet enjoyment would be implied. Against these authorities and expressions of opinion there is the case of *Baynes & Co.* v. *Lloyd & Sons* (2), which is not a direct authority on the point, but in which Kay L.J., in delivering the judgment of the Court, did express the opinion that no covenant for quiet enjoyment was to be implied from the mere relationship of landlord and tenant, or from any words in a lease other than the word "demise." I do not think that we are bound to treat *Baynes & Co.* v. *Lloyd & Sons* (2) as a binding authority upon us on this point, as the county court judge has done. I think that there are authorities to the contrary of the opinion expressed in Kay L.J.'s judgment. I, therefore, come to the conclusion that, where there is a letting, a covenant for quiet enjoyment is to be implied from the mere relationship of the parties.

The only other point in the case is whether there has been any breach of the implied covenant. The plaintiff being under a statutory obligation to paint the outside of the house during the period for which it was let to the defendant, and there being power given to the statutory authority to paint in her default, she did the painting herself. The county court judge has found that the doing of the painting rendered it necessary for the defendant and her family to leave the house for about a fortnight. I understand that as being a finding that the plaintiff, by doing the painting during the term, deprived the defendant of the possession of the house for that time. That being so, I am of opinion that the Act of Parliament, which was in existence before the plaintiff let her house, is no defence to the counter-claim here. This is not a case of force majeure. The plaintiff might have protected herself by the terms of the tenancy. I think, therefore, that the defendant is entitled to judgment for 15*l*. upon her counter-claim.

(1) 41 Ch. D. 88, at p. 96.

(2) [1895] 2 Q. B. 610.

I may add, on the first point, that I think the county court judge would have decided it as we are doing if he had not felt himself bound by the opinion of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons.* (1)

DARLING J. I am entirely of the same opinion. There is no doubt that, if the word "demise" is used in a lease, a covenant for quiet enjoyment is to be implied. But I think that that covenant is also to be implied from any words of a like import. Apart from the question as to the effect of 8 & 9 Vict. c. 106, I do not understand it to be denied by any one that the word "grant" would have the same effect. Where either of these words is used, it is expressly stated in Sheppard's Touchstone that such a covenant is to be implied. Now, it is not disputed that there is no difference in what passes to the tenant under the words "I agree to let" and "I demise"; but it is contended that in the latter case a covenant for quiet enjoyment is to be implied, and in the former not. No reason is suggested for the distinction, but it is said that there is authority for it, and the judgment of Kay L.J. in *Baynes & Co.* v. *Lloyd & Sons* (1) is relied upon. I do not think that Kay L.J. at all makes out the proposition which he there lays down, or that the authorities which he cites are inconsistent with the view that a covenant can be implied from the mere relation of landlord and tenant. He says (2): "At pages 271, 272 of the Touchstone it is said that the most usual and proper words for making a lease are 'demise grant and to ferme let,' but that other words—'whatsoever word will amount to a grant'—such as 'give betake or the like,' will make the lease; but it is not said that there is any implication of a covenant from any of those other words." But the question is not being dealt with there at all. Implication of covenants is dealt with in quite another place. The passage at page 271, to which Kay L.J. is referring, occurs in c. 14, and is as follows: "Albeit the most usual and proper making of a lease is by the words, demise, grant, and to ferme let"—which expression I take to mean to securely let, to assure in letting—"and with an habendum for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease. And therefore a lease may be made by the word 'give,' 'betake,' or the like. The word 'locavit' also is a good word. And the use in the Exchequer is to make leases by the word 'committimus,' which is a good word to make a lease. And if A. do but grant and covenant with B. that B. shall enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if A. promise to B. to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if A. licence B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate, upon condition, that if such a thing be, or be not, done at such a time, that the feoffor, &c., shall re-enter, to the end that in this case the feoffor, &c., may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the incertainty of the time (whereunto care must be had) do not make it void." No distinction is drawn between the leases made in the different ways there mentioned. Nothing at all is said in that passage about the implication of covenants. That had been said seven chapters before, in c. 7—"Of a Covenant," at page 165, where it is said that if a lease is made by the words demise or grant, a covenant for quiet enjoyment is to be implied. The author nowhere says that no other words will do it. And when, in the passage I have cited from a subsequent part of the book, he deals with what is wanted to make a good lease, he says "whatsoever word will amount to a grant" is sufficient. So far as that citation goes, therefore, I do not think that it is at all inconsistent with the view that the covenant can be implied from any words constituting the relationship of landlord and tenant. Another citation by Kay L.J. is from Viner's Abridgement, Covenant, F: "Action of covenant lies upon the words 'demise' and 'grant' in an indenture of lease, though there are no other words comprehending a warranty in them." That does not say that no action of covenant will lie upon any other words of letting. He then cites a passage from Bacon's Abridgement, Covenant, B, where, as an example of words that import, without expressing, a covenant, the case is instanced of a man making a lease for years by the words "concessi" or "demisi." There, again, it is not said that no other words will have that effect. It seems to me, therefore, that the dictum of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (1), which is absolutely contrary to the decisions in *Bandy* v. *Cartwright* (2) and *Hall* v. *City of London Brewery Co.* (3), is not established by the authorities there cited in support of it, and I do not think that we ought to follow it.

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(1) [1895] 2 Q. B. 610.

(2) [1895] 2 Q. B. at p. 613.

Upon the other point I have nothing to add.

CHANNELL J. I am of the same opinion. I must say that, speaking for myself, until I read this judgment of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (1), I always had thought that from the mere fact of letting there was some agreement implied by the landlord that the tenant should not be disturbed, though there might be a question as to what that agreement was. As to this question also, however, I should have thought that it had been now settled that the agreement was only against disturbance by the lessor and those claiming under him, and was limited to the duration of the lessor's interest. If the undertaking is limited in that way, it would seem, as was pointed out by Cockburn C.J. in *Hall* v. *City of London Brewery Co.* (3), to be nothing more than that which the act of letting into possession for a fixed period would itself in common sense import. If a man lets a house for a year, he most undoubtedly does undertake that he will not himself interfere with the possession of his tenant during that time, and it is only reasonable that his undertaking should be held to extend to those claiming under him. If it is attempted to extend that undertaking to the acts of any other

(1) [1895] 2 Q. B. 610.

(2) 8 Ex. 913.

(3) 2 B. & S. 737.

person who has a legal right to interfere with the tenant's possession, that is introducing something in the nature of a warranty against acts which the landlord cannot control, and something which is certainly not necessarily implied by the relationship of landlord and tenant. All that I thought to be perfectly well-settled law, resting, no doubt, a good deal on *Bandy* v. *Cartwright* (1) and *Hall* v. *City of London Brewery Co.* (2) Then comes the case of *Baynes & Co.* v. *Lloyd & Sons.* (3) But the decision in that case was that, if any covenant could be implied from the letting there, it would terminate with the expiration of the lessor's estate, and that, consequently, eviction by title paramount after such expiration was no breach of it, so that there was no decision in that case on the point which we have to deal with. But there is undoubtedly an expression of opinion, which has the great authority of Kay L.J., that a covenant for quiet enjoyment is not to be implied from the mere relationship of landlord and tenant. On the other hand, that is different to what all the text-book writers had understood to be the law up to that time, and the way in which the Lord Justice disposes of *Bandy* v. *Cartwright* (1) and *Hall* v. *City of London Brewery Co.* (2) does not seem to me at all satisfactory. Under these circumstances, I think that the right course for us to take is to act upon our own view of the law. I am not at all surprised that the county court judge supposed himself to be bound by the opinion expressed in the judgment in *Baynes & Co.* v. *Lloyd & Sons.* (3) But I think that we are not so bound, and that we are, therefore, bound to form our own judgment upon the question.

The second question in the case—whether there was such an interference by the defendant with the plaintiff's possession under the tenancy agreement as to amount to a disturbance of that possession and a breach of the contract for quiet enjoyment—is a question of considerable doubt. But in all the cases that is said to be a question of fact. I think that in this case the county court judge has in substance found that, if there was an implied undertaking for quiet enjoyment, there was a breach of that undertaking. Therefore, although I think the question is a doubtful one, I agree that it is concluded by the findings of the county court judge.

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(1) 8 Ex. 913.

(2) 2 B. & S. 737.

(3) [1895] 2 Q. B. 610.

Appeal allowed. Leave to appeal.

Solicitors for defendant: *Rowcliffes, Rawle & Co., for F. S. Champion, Sons & Hart, Brighton.*

Solicitors for plaintiff: *Biggs, Roche & Co., for Buckwell & Berkeley, Brighton.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1902
June 23.

THE KING ON THE PROSECUTION OF JANE EMMA SMITH v. HOWARD AND OTHERS, LICENSING JUSTICES OF FARNHAM.

Licensing Acts — Licence — Renewal — Discretion of Justices — Preliminary Inquiry as to Number and Condition of Licensed Houses—Objection to Renewal taken by Justices or by their Direction—Disqualification from Adjudicating on Application—Personal Interest or Bias—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61)—*Licensing Act,* 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act,* 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

The attention of licensing justices having been called to the number of licensed houses in their district, they appointed some of their number a committee to investigate and report on the condition, position, and circumstances of the licensed houses. A detailed report was made, and a recommendation that all applications for renewal should be objected to, and notice given to each of the licensees to attend at the hearing. The report was adopted, and the justices at the annual licensing meeting objected through their chairman to the renewal of all the licences, and directed that notice should be given to each holder of a licence to attend at an adjourned meeting. At that meeting evidence was heard upon oath in each case, and the justices decided against the renewal of nine of the licences. On appeal against a decision of the King's Bench Division refusing an application for a mandamus to the justices to hold a further adjournment of the licensing meeting, and to hear and determine according to law the applications for the renewal of the nine licences:—

Held, that since the justices were entitled to take, or direct their officer or agent to take, objection to the renewal of licences, they were within their rights in making a preliminary investigation as to the licensed houses in their district; and the fact that they had done so, and adopted the report of the committee appointed for the purpose of making the investigation, did not debar them from hearing the applications and deciding on the question of renewal.

APPEAL from a decision of the King's Bench Division discharging a rule nisi for a mandamus to justices to hold an adjourned licensing meeting, and to hear and determine an application for the renewal of a licence.

It appeared that in February, 1901, a letter was addressed by the clerk of the peace of the county of Surrey, by direction of the confirming committee of quarter sessions for the county, to the clerk of the Farnham justices. In this letter attention was called to the large number of licensed houses in the district of Farnham; and the justices thereupon held a meeting to consider the matter so brought to their notice. A committee of five was appointed to investigate and report on the matter. A circular letter was sent to the holders of licences, containing certain questions; and, further, the committee inspected all the licensed houses, forty-five in number, and obtained information from persons who were found on the premises. The committee reported the result of their inquiries as to the condition, position, and circumstances of each of the forty-five licensed houses in the district, and the report and recommendations of the committee were adopted by the licensing justices with one dissentient. At the next general annual licensing meeting an objection was made by Mr. Hayes, who was not one of the licensing justices, to the renewal of ten of the licences in the district; and the chairman, on behalf of the justices and in accordance with the recommendation of the committee, also objected to the renewal of each of the forty-five licences, stating that the reason the justices objected was in order that every one of the licensees might have equal opportunities of giving evidence before the justices, who might thus be enabled to decide with justice and fairness. The licensing meeting was thereupon adjourned for a fortnight, and the clerk was directed to serve formal notice in each case requiring the licensees to attend in person. The clerk was also directed to procure the attendance of the necessary witnesses at the adjourned meeting. The notices of objection were accordingly given, one ground stated being in each case that the licensed house was not required. At the adjourned meeting objection was taken on behalf of the applicants to the justices who had taken any part in the previous proceedings sitting to adjudicate on the applications for renewal. A separate objection was also taken to one of the justices on a ground personal to himself. The objections were overruled, and each case was gone into and evidence was given on oath, the witnesses being examined by the chairman. The result of the adjourned meeting was that the justices resolved to refuse to renew the licences in the case of Jane Emma Smith and eight other applicants.

Application was made to the King's Bench Division on behalf of each of the applicants the renewal of whose licences had been refused for a mandamus to the justices to hear and determine the applications according to law; and rules nisi were granted which, on argument, were discharged by the Court (Lord Alverstone C.J., Darling J., and Channell J.)

The applicants appealed.

June 14. *Danckwerts, K.C.*, and *Avory, K.C.*, for the prosecutor, Jane Emma Smith. The first objection to the proceedings before the licensing justices is that it was not competent for them, sitting as licensing justices, to make an objection to the renewal of a licence. The opening words of s. 42, sub-s. 2, of the Licensing Act, 1872 (1), shew that it was

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(1) 35 & 36 Vict. c. 94, s. 42: "Where a licensed person applies for the renewal of his licence the following provisions shall have effect:—

"(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend:

"(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice contemplated that the objection should be made by persons other than the justices, and not started by the justices themselves; and the proviso only applies to cases in which the person objecting has failed to give notice of his intention to oppose the renewal as required by the sub-section. It was held by Hawkins J. in *Reg.* v. *Anglesea Justices* (1), which is the only judgment that has really dealt with this point, that the objection under the proviso to sub-s. 2 cannot be made by the justices. The case of *Reg.* v. *Farquhar* (2) appears to have been the origin of the authorities to the contrary; but the question whether the justices could themselves initiate the objection was really not decided in that case. The real point there was that the justices had never given the applicant an opportunity of attending and being heard, and Blackburn J. only quite incidentally threw out the suggestion, that it was not impossible that the justices might of their own knowledge make the objection themselves, which suggestion appears to have been the foundation of the dicta in various cases relied on by the defendants. It is not disputed that a justice may waive his capacity of justice, and make an objection to the renewal of a licence in his private capacity, but he cannot so object as a justice. In *Baxter* v. *Leche* (3) this point never really arose, for in that case there was a notice of objection given by independent objectors.

Secondly, a justice who makes an objection to the renewal of a licence thereby disqualifies himself from sitting to adjudicate upon it. It is important for this purpose to bear in mind the distinction between an application for the grant of a fresh licence and an application for a renewal of a licence. In the case of the former the justices exercise their discretion without any objector or objection being required. The case of an

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hereinbefore prescribed had been given:

"(3.) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath.

"Subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

(1) (1895) 65 L. J. (M.C.) 12.

(2) (1874) L. R. 9 Q. B. 258.

(3) (1898) 79 L. T. 138.

application for a renewal is altogether different, and it has been held that there is a presumption in favour of renewal, and the burthen of proof is on the objector: see *Evans* v. *Conway Justices* (1); *Sharp* v. *Wakefield.* (2) The justices, therefore, have to determine whether the burthen of proof has been sustained. How can the justices, if they have been themselves the objectors, impartially determine whether they have sustained the burthen of proof which lay upon them? They will be occupying the position both of prosecutor and judge. With regard to the alleged expression of opinion on these points by Sir E. Fry at sessions, referred to in an article in 64 Justice of the Peace, p. 642, it does not appear that the judgment of Hawkins J. in *Reg.* v. *Anglesea Justices* (3) was cited to him, nor does it appear clearly whether in that case the justices who had objected to the renewal sat to determine the case. It is submitted that on principle the same person cannot assume the rôles both of prosecutor and judge: *Reg.* v. *Antrim Justices.* (4)

A further objection arises on the question of bias. Assuming that the fair inference from the facts is that the justices came to the hearing determined to refuse the renewal of a certain proportion of the licences, can it be said that they brought impartial minds to the hearing, as they were bound to do? Then, with regard to the previous collection of evidence not on oath as to particular houses, no doubt justices might be entitled to look at the place and inform their minds with regard to the general circumstances of the neighbourhood, and suchlike matters, beforehand; but they are not entitled to make inquiries from persons not on oath with regard to particular matters affecting particular premises, and discuss these matters before the hearing. There are circumstances in this case raising a strong presumption that these justices had predetermined to reduce the number of licences, and that evidence was in pursuance of that determination collected before the hearing of a nature unfavourable to certain premises. In the judgment of the Divisional Court the case is treated as if the question were whether the justices did in fact decide impartially; but it has been repeatedly laid down that the question is not whether the justices were really biassed or decided partially, but whether there was a real likelihood of bias: see *Reg.* v. *Meyer* (1); *Leeson* v. *General Council of Medical Education and Registration* (2); *Allinson* v. *General Council of Medical Education and Registration* (3); *Rex* v. *Sunderland Justices.* (4) The section enacts that the justices shall only take evidence on oath; yet the justices in this case took evidence not upon oath before the hearing, and it was very probable that this course would bias their minds, having regard to the fact that it had been predetermined by them to diminish the number of licences.

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(1) [1900] 2 Q. B. 224.

(2) [1891] A. C. 173, at p. 184.

(3) 65 L. J. (M.C.) 12.

(4) [1901] 2 I. R. 133.

Lastly, one of the justices was disqualified on the ground of bias by reason of his having attended a meeting at which the course taken by the justices in instituting inquiries with a view to the reduction of the number of licensed houses was unanimously approved.

Disturnal, for the prosecutors in the other cases.

Low, K.C., and *Hohler*, for the justices. The proposition for the appellants is that, although it has over and over again been laid down that the justices have as absolute a discretion with regard to renewing a licence as they have with regard to the grant of a fresh licence, nevertheless they are prevented from exercising any discretion as to the renewal of a licence, unless they are put in motion by some individual member of the public, who comes forward and starts a kind of suit against the licence-holder to deprive him of his licence. Sect. 42 of the Licensing Act, 1872, is put forward as the foundation of this proposition. That section is treated by the appellants as if it comprised the whole of the law on the subject; but, in order to apprehend the effect of that section rightly, it is necessary to consider the previous state of the law on the subject. The foundation of the licensing law is the Alehouse Act, 1828, by which an absolute discretion was given to the justices to consider in every year what licences should be granted. Under that statute the only parties concerned were the justices on the one hand, and the applicant for the licence on the other. The primary object of s. 42 of the Licensing Act, 1872, was to relieve the licence-holder from the necessity of having to attend at the licensing meeting to obtain a renewal of his licence, unless required to do so by the licensing justices. Sub-s. 2 provides that the justices shall not entertain any objection to the renewal of such licence—by which is clearly meant an objection by some independent person—unless written notice of an intention to oppose the renewal of such licence has been served on the holder as required by the sub-section; and the proviso is that, notwithstanding that no notice has been given, on an objection being made, the justices may adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on that day, when the case will be heard and the objection considered as if the notice thereinbefore prescribed had been given; and the last clause of the section provides that, subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as theretofore. There is, it is submitted, nothing in the section to take away the discretion which justices had with regard to the renewal of licences before that section was passed. It gives a code of procedure with regard to applications for renewals in order to obviate the necessity of the applicant for renewal having to attend at the licensing meeting as a matter of course, and at the same time provides for his having an opportunity of attending, in case of objection being made to the renewal; but it leaves the discretion of the justices untouched. Clearly, before the passing of that section, the justices could themselves have initiated an objection to the renewal of the licence. That seems to have been really the view of Hawkins J. in *Reg.* v. *Anglesea Justices.* (1) He said there that he did not think that the justices could object under the authority of the proviso to sub-s. 2 of s. 42, that sub-section applying only to objections made by persons other than the justices, but he said that the justices in that case had abundance of authority for what they did independently of the sub-section. It is not necessary to go so far for the purposes of this case, but it is submitted that the

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(1) (1875) 1 Q. B. D. 173.

(2) (1889) 43 Ch. D. 366.

(3) [1894] 1 Q. B. 750.

(4) [1901] 2 K. B. 357.

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(1) 65 L. J. (M.C.) 12.

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application for a renewal is in substance the same for this purpose as an application for a fresh licence, and the justices have an absolute discretion and might refuse the licence without hearing evidence. Sect. 42 provides that the justices shall not receive any evidence except on oath, but it does not say that there must be evidence. At any rate, in this case the evidence on which the justices decided—that is, the evidence given at the licensing meeting—was on oath. The decision in *Boulter* v. *Kent Justices* (1) shews that the objector is not in the position of a party to a litigation. There is, as Lord Herschell pointed out, no lis, no controversy inter partes, and no decision in favour of one of them and against the other. The objector, when he has made the objection, need do nothing more, and cannot be properly called a prosecutor. This is not the case of an individual justice raising an objection on some ground personal to himself, but it is a case in which the justices were performing the duty which devolved on them of considering whether there were too many public-houses in the district. They have to determine this on public grounds, and cannot be blamed for obtaining information to guide them. If the justices cannot proceed on their own initiative, the licence would have to be renewed as a matter of course wherever the objector contented himself with merely making an objection.

As to bias, there was no predetermination as to refusing to renew any of the licences. There could only be a case of bias if there were a personal opposition to some particular licence; and the facts shew that no such opposition existed.

The mere fact of attending a public meeting at which the general policy of the justices was approved cannot affect the right of any one of them to hear the applications for renewal, but, in fact, on the objection being raised the gentleman objected to left the bench, and took no part in the decision.

As to whether a mandamus will lie, it may be pointed out that there is an appeal to quarter sessions, and that, if justices are held in any case to be disqualified by reason of bias, a

(1) [1897] A. C. 556.

mandamus to them to hear the case would hardly seem to be appropriate.

[They cited also *Dakin* v. *Parker* (1); *Reg.* v. *Howard* (2); *Reg.* v. *Smith.* (3)]

Avory, K.C., in reply.

Cur. adv. vult.

June 23. Collins M.R. read the following judgment:—This is an appeal from the decision of the Divisional Court discharging a rule for a mandamus addressed to the licensing justices for the Farnham Petty Sessional Division of the county of Surrey, calling upon them to shew cause why a writ of mandamus should not issue commanding them to hold a further adjournment of the annual licensing meeting and to hear and determine according to law certain applications for the renewal of licences.

The case is one of importance, as the question raised goes to the root of the law and practice in the matter of the renewal of licences. The circumstances are shortly these. In February, 1901, a letter was addressed by the clerk of the peace of the county to the clerk of the Farnham justices informing him that the attention of the county licensing committee had been called to the large number of licences existing in the parish of Farnham and Farnham Royal, pointing out that the proportion was largely in excess of any other parish in the county, and stating that it was the opinion of the committee—that is, the confirming committee—that steps should be taken whereby the licences of a substantial number of such houses should be discontinued, and inviting the justices to consider this question at their next annual licensing meeting. The justices, as appears by the affidavit of their chairman, addressed themselves to the consideration of the question raised by this letter, and appointed a committee to consider the statistics referred to in the letter. Upon a report of this committee, which was unanimously adopted, the committee were authorized to inquire into the condition, position, and circumstances

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(1) [1894] 2 Q. B. 556.

(2) (1889) 23 Q. B. D. 502.

(3) (1873) L. R. 8 Q. B. 146.

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of each licensed house in the Farnham district, which they accordingly proceeded to do—first, by framing questions addressed to the owners of the houses, and afterwards by personal inspection, the results of which were duly reported to the licensing justices, with recommendations which were adopted by them with one dissentient. It is clear from their report that they were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed by the clerk, stating that he was acting under the instructions of the justices present at the annual licensing meeting.

At the general annual licensing meeting held on March 1, a certain Mr. Hayes objected to the renewal of some of the licences in urban Farnham, and the chairman of the justices, on behalf of the justices, made objection to the renewal of all the forty-five licences in the Farnham urban district, stating that the reason why the justices thus raised objections was "in order that every one of the licensees might have equal opportunities of giving evidence before them, and the justices might thus be enabled to decide with justice and fairness," and the meeting was accordingly adjourned until March 14 following, and instructions were given to Mr. Mason, the deputy clerk, to serve formal notice in each case, requiring the licensees to attend in person and stating the grounds of objection. When the cases came on for hearing, evidence on oath was given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. A copy of the report itself had been placed by the justices in the hands of counsel for the applicants.

The rule nisi was obtained on the ground that the justices were incapacitated from dealing with the question of the renewal of licences inasmuch as they were at once parties and judges, that they had acted upon evidence not taken upon oath as provided by sub-s. 2 of s. 42 of the Licensing Act, 1872, and that they must be deemed in law to be biassed on the ground that they had predetermined to refuse the renewal of some of the licences and had already inquired into the cases. There was also a particular objection to one of the magistrates, which I will deal with, if necessary, later on.

In considering how far these points are material, it is necessary to understand precisely what is the character in which the justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter* v. *Kent Justices* (1) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a Court, and that the transaction itself is in no sense a "lis" to which there are parties. The objector is not a "party"; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not. This point is so material to the true appreciation of the cardinal consideration in these cases that I propose to read one or two passages from the judgments of Lord Halsbury L.C. and Lord Herschell in the case I have just referred to. Lord Halsbury said (2): "The difference between the procedure of a Court and of the licensing meeting is not only one of nomenclature. Where justices are acting as a Court of any sort they must proceed according to the regular rules which are applicable to all Courts of justice; but in respect of an application for a licence or its refusal, they may, and constantly do, receive representations not on oath." He then quoted Lord Kenyon, who in 1790, in the case of *Rex* v. *Downes* (3), when holding a licence bad because it was granted at a private meeting, did not rely upon the general principle that all Courts of justice must be open, but upon the ground that the statute directed it, and added that the construction of the then statute law was advantageous to the public because it was "of importance to the public that licences of this sort should be granted openly, and not by stealth, in order that they may have an opportunity

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(1) [1897] A. C. 556.

(2) [1897] A. C. at p. 562.

(3) (1790) 3 T. R. 560.

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of objecting to the granting of these licences to particular persons on the ground of unfitness." The Lord Chancellor added: "The Acts referred to by the learned judges were repealed by the Act of 1828. But a careful distinction appears to me always to have been reserved between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices." Further on he said (1): "If I am right in the distinction I have drawn between a magistrates' meeting for licensing purposes and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the Legislature intended to include in the definition, and to make applicable to that definition, persons who were, in fact, justices of the peace, but who in the particular matter here referred to, namely, 'licensing,' were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on." Lord Herschell said as follows (2): "Persons objecting to the grant of a licence are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one inter partes at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the Court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all, then, become 'the other party'? There is, in truth, no lis, no controversy inter partes, and no decision in favour of one of them and against

(1) [1897] A. C. at p. 564.

(2) [1897] A. C. at p. 569.

the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in s. 2 seems, then, to me an additional reason for holding that an appeal from the 'act' of the justices in refusing a licence is not an appeal from a 'conviction or order' of a Court of summary jurisdiction." The standard, therefore, to be applied in determining whether justices have incapacitated themselves from dealing with the renewal of licences is not in any sense that applicable to judges dealing with litigation. Moreover, their position in relation to the right of objecting is not res integra. Since *Reg.* v. *Farquhar* (1), at all events, decided in 1874, the practice has been that they might, where circumstances required it, themselves make or cause to be made an objection, at all events provided they adjourned for the purpose of hearing it, and caused the necessary notice to be served requiring attendance upon a future day. I think this practice was founded on a true view of the law for reasons which I will state hereafter, but, whether it is or not, I think it has been treated as law for nearly thirty years, and ought not to be now disturbed. In *Reg.* v. *Eales* (2), decided in 1880, it is thus referred to by Cockburn C.J. He says (3): "And although by the practice founded upon a dictum in the case of *Reg.* v. *Farquhar* (1) an objection may be made by the justices themselves, it must be upon one of those four grounds"—it was a case under the Act of 1869—"and the particular ground of such objection should be notified to the appellant in order that an apportunity may be given to meet it." He there treats the practice as established and in no way dissents from it. It has been treated as law in more than one case referred to in argument, and was formally decided to be so in 1898 in *Baxter* v. *Leche.* (4) It is true that a different view was taken by Hawkins J. in *Reg.* v. *Anglesea Justices.* (5) But in the same case that learned judge upheld a decision based upon a notice given by the chief constable apparently at the instance of the licensing justices themselves. On the general question whether there is such incompatibility between the position of the justices who adjudicate and that of an objector that the two cannot be combined, it seems to me to be immaterial whether the objection is made personally by the justices or by somebody else at their instance, and from the reported cases it seems to be a very common practice, and one that has never been questioned, for the objection to be made at the instance of the justices, if not in their name. The observations of Hawkins J. in the case referred to are very valuable as to the discretion of justices, and their right to discuss among themselves matters affecting the expediency of renewals, and their right to take steps to have a full investigation of them. On the same point Lord Halsbury, in *Sharp* v. *Wakefield* (1), said: "By the express language of the statute, which is still the governing statute, the grant of a licence is expressly within the discretion of the magistrates. For reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but if one were to argue a priori, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence? It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by the proper authorities, and so forth." The key to the position appears to be that the justices, in dealing with licences, are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit by in silence although they had reason to suppose that there were very good grounds which

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(1) L. R. 9 Q. B. 258.
(2) (1880) 42 L. T. 735.
(3) 42 L. T. at p. 737.
(4) 79 L. T. 138.
(5) 65 L. J. (M.C.) 12.

(1) [1891] A. C. 173, at p. 178.

ought to be inquired into before the matter was decided; and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the licence would have to be disposed of without the necessary investigation. I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson* v. *General Council of Medical Education and Registration* (1) and *Allinson* v. *General Council of Medical Education and Registration* (2) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them. Assuming, therefore, that which I regard as clearly established by the evidence, that what was done by the justices in this case was honestly done to enable them to secure a full investigation of the facts for the purpose of avoiding the injustice which might arise if they had to deal with the question without such materials, and upon one or more isolated applications only, I think they were within their rights in doing what they did, and were not thereby debarred from sitting and deciding upon the question of renewals. Their original and fundamental discretion in the matter of granting or refusing applications for new licences remains when they are invited to deal with renewals, except so far, and only so far, as it is conditioned by s. 42 of the Act of

(1) 43 Ch. D. 366.

(2) [1894] 1 Q. B. 750.

1872, as amended by s. 26 of the Act of 1874, which relates to procedure only: see *Sharp* v. *Wakefield*. (1)

In my opinion, the course the justices took involved no predetermination of any point, but merely secured a full and informed discussion of the whole subject. It is not denied that on the hearing all the formalities of the 42nd section were complied with. The respondents, indeed, contend that the justices could have exercised their discretion without complying with these conditions, but I think the case of *Evans* v. *Conway Justices* (2) debars them from advancing that contention in this Court.

I agree, therefore, with the decision of the Divisional Court, and it is not necessary to discuss in detail the numerous cases which were referred to in argument before us.

With regard to the special objection urged against Mr. Bentall on the ground that he was present at a meeting at which certain resolutions were passed upon which he did not vote, I think it cannot be sustained. It is not necessary to express an opinion upon the technical objections urged against the granting of a mandamus in the form prayed for. The appeal must be dismissed.

MATHEW L.J. read the following judgment:—The grounds relied upon in support of the appeal were—(1.) That the justices were prohibited from being themselves the objectors to the renewal of the licence; (2.) that they were disabled from adjudicating upon the grounds of objection; and (3.) that their decision was invalidated on the ground of personal interest in the result, or manifest bias against the applicant.

As to the first point, if the jurisdiction of the justices depended upon the Act of 1828, there would seem to be no question that objections to a renewal might be made by the bench sitting in open Court, and that, upon giving the applicant the opportunity of being heard, the justices had an absolute discretion to grant or refuse the renewal. But it was argued that the discretion of the justices could no longer be exercised freely, and that their jurisdiction was fettered by the provisions

(1) [1891] A. C. 173, at p. 182.

(2) [1900] 2 Q. B. 224.

of the Act of 1872. Attention was called to the language of s. 42, and it was contended that the jurisdiction of the magistrates depended upon the objection being made by some one who was not a member of the bench. No reason was given for this supposed change of the law. It would matter nothing to the applicant from what quarter the objection came. A third person would be entitled to object without giving a reason, and might then withdraw and be no party to the subsequent proceedings. The grant of a renewal was for the magistrates only, and would seem to depend in every case upon the result of the subsequent inquiry upon sworn testimony. But it was said that the inference from the language of the section was clear, and that the object of the Act was to provide for a new method of procedure in all cases. Sub-s. 1 of s. 42 of the Act of 1872 would seem to assume that an objection might be made from the bench, and that the applicant might be required to attend in person upon having proper notice given him in accordance with sub-s. 2. He would thus learn the grounds upon which his attendance was considered by the justices to be necessary. The proviso in sub-s. 2 leads to the same conclusion. It would appear, therefore, that the justices may entertain any objections to the renewal whether made previously or not and take evidence upon them.

Further, even if, contrary to what would seem to be the true meaning of the statute, sub-ss. 1 and 2 must be taken to apply only when the bench are not the objectors, the last clause in the section preserves their former powers and discretion. They continue to possess the authority conferred upon them by the Act of 1828. This is in accordance with the valuable judgment of Hawkins J. in the case of *Reg.* v. *Anglesea Justices*. (1) I see no reason to doubt the authority of the cases referred to by the Master of the Rolls, which sanction the conclusion that objections may be made from the bench in open Court, and may afterwards be investigated upon proper notice to the applicant to attend and answer the objections. The argument for the appellant would involve this consequence—that the magistrates, if there were no objector,

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(1) 65 L. J. (M.C.) 12.

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would be bound to renew the licence, though they knew, or had been furnished with reliable information, that the application ought to be refused. But then it was said that, even though objections might be made from the bench, the justices, who were parties to the notice to the applicant to attend, could not afterwards sit and adjudicate upon the application. The proceeding would have been regular under the Act of 1828, and it seems to me that there is no ground for saying it was impliedly forbidden by the Act of 1872. But it was urged that the inquiry was in the nature of the trial of an action between the justices and the applicant, and that those who had instituted the proceedings could not adjudicate upon what was described as their own cause. But, as has been laid down in the case referred to by the Master of the Rolls, in licensing cases there is no lis, and nothing in the nature of a suit or a prosecution. The duty of the justices is to arbitrate impartially, not between themselves and the holder of the licence, but between that person and the public. The fact that the magistrates had obtained the report which was so much complained of by the counsel for the appellant was the ground upon which we are asked to say that the justices had made themselves parties to the opposition in each case, and were attempting to adjudicate on their own behalf. The form of the report, it was said, shewed that the justices must have arrived at a conclusion that the appellant's premises were not required, and that the subsequent inquiry was one designed to support a foregone decision. But I am wholly unable to adopt this reasoning. The report seems to me to contain no more than the information necessary to enable the magistrate to enter upon the consideration of the question whether there were too many licensed houses in the district. The document was neutral in its character, and contained no indication of an opinion as to the claim for renewal of the appellant or any other occupier of licensed premises. The justices seem to have acted with perfect fairness, and to have been guided in the conclusions at which they arrived, not by anything contained in the report, but by the sworn evidence laid before them. The objection that the justices had what was described as an interest in the result of each inquiry, took another shape in the suggestion that they were shewn to have been influenced by bias. There is no ground for any such conclusion. The magistrates proceeded from first to last with commendable care, and seem to me to have had no other motive than the desire of honourable men to discharge their duties faithfully. With reference to Mr. Bentall, I agree that his temporary presence on the bench did not invalidate the proceedings. He was not shewn to have committed himself to any opinion on the subject of inquiry, or to have taken sides, as was suggested, against the appellants. It is not necessary to deal with the technical objections to the application for a mandamus which were raised by learned counsel for the respondents.

Cozens-Hardy L.J. read the following judgment:—In this case I should be content to say that, for the reasons assigned by the Master of the Rolls, I agree that the appeal must be dismissed. But, having regard to the great importance of the questions which have been raised as to the precise powers and duties of justices with respect to renewals of licences, it is right that I should state shortly, in my own words, the conclusions at which I have arrived. I do not propose to restate the facts. It cannot be disputed that, under the Act of 1828, the justices had an absolute discretion to grant or refuse applications for new licences and applications for the renewal of old licences. Their functions in this matter were administrative rather than judicial, and they were entitled to rely upon their general knowledge of the needs of the locality as well as upon any evidence which might be adduced. The Act of 1828 is still the governing statute, except so far as it has been modified by the Acts of 1872 and 1874. With respect to new licences, there are very material modifications to which it is not necessary to refer in detail. With respect to renewals, the material section—namely, s. 42 of the Act of 1872, as amended by s. 26 of the Act of 1874—need alone be considered. Now, in two cases the effect of this section has been discussed in the House of Lords. In *Sharp* v. *Wakefield* (1) it was held

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(1) [1891] A. C. 173.

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that the old discretion of the justices under the Act of 1828 was not affected, and that s. 42 only dealt with procedure. The attempt to establish a vested right to the renewal of a licence, except on some ground personal to the applicant, failed. In *Boulter* v. *Kent Justices* (1) it was held that justices in granting or refusing to grant an application for renewal are not a Court, and that the objector contemplated by s. 42 is not a litigant, and that, in short, there is no lis. Now, in the face of those decisions, it has been strenuously argued before us that the effect of this section is to prevent the justices from exercising their discretion, and discharging the duties imposed upon them in the public interest, unless some outsider appears and objects to a renewal, or, in other words, that they are powerless themselves to require the attendance of the licence-holder with a view of considering whether his licence should be renewed. I cannot adopt this view. It seems to me that there is no reason why the justices should not on their own initiative direct the licence-holder to attend on a subsequent day, inform him of the grounds of objection, and then deal with the matter in due course at the adjourned meeting. The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter* v. *Kent Justices* (1) that there is no lis between an objector and a licence-holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points. It is not necessary to consider whether the justices can act solely upon their own local knowledge—for example, as to the number of public-houses compared with the population, or whether they must in all cases act upon sworn evidence. In the present case the evidence was all taken upon oath. If I am right in the view that magistrates may themselves take, or direct their officer or agent to take, objection, all difficulty seems to be removed. It cannot be

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(1) [1897] A. C. 556.

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wrong to obtain careful and accurate information before taking, and with a view to taking, such objection. No question of bias as against a particular licence-holder arises. In making the preliminary investigation and considering whether the number of licensed houses was in excess of the needs of the district the justices were simply preparing to discharge the important duties, mainly administrative, imposed upon them by the Act of 1828. In directing all the licence-holders to be served, and in taking sworn evidence upon each separate application, they seem to me to have acted with praiseworthy care. They were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred. There is no ground for suggesting that they exercised their discretion capriciously or without regard to the circumstances of each individual case, or without considering the requirements of the locality. The separate objection taken to Mr. Bentall may be disposed of very shortly. He was present at a meeting of the Surrey Congregational Union, at which a mild and harmless resolution was passed expressing satisfaction at the efforts of the Farnham magistrates to reduce the number of licensed houses. He took no part in the proceedings, and I think it idle to suggest that this in any way precluded him from acting as a licensing justice. I may add that in fact he retired directly it was brought to his mind that any objection could be taken to his presence. For these reasons I agree with the Divisional Court that the rule for a mandamus must be discharged.

Appeal dismissed. (1)

Solicitors for prosecution: *W. Montgomery White, for E. A. Jackson & E. Kempson, Farnham.*

Solicitors for defendants: *Prior, Church & Adams, for Hollest, Mason & Nash, Farnham.*

(1) The other appeals followed the result of this one and were dismissed.

A. M.

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July 3.

[IN THE COURT OF APPEAL.]

ROYAL EXCHANGE ASSURANCE CORPORATION *v.* SJOFORSAKRINGS AKTIEBOLAGET VEGA.

Insurance (Marine)—Policy—Time Policy for more than Twelve Months—Continuation Clause, Validity of—Risk or Adventure insufficiently defined—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 93.

A policy of marine insurance upon a ship for the period of twelve months contained the following continuation clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium." On the expiration of the twelve months the ship was abroad, and on her voyage home was lost. In an action on the policy:—

Held, that the policy was one entire contract of insurance for a time exceeding twelve months, and therefore invalid as being in contravention of s. 93, sub-s. 3, of the Stamp Act, 1891: and that, if the continuation clause could be regarded as a separate insurance, either for a voyage or time, it did not specify the particular risk or adventure insured sufficiently to satisfy the requirements of the sub-section; and therefore in either view the policy was invalid. (1)

Appeal from the judgment of Bigham J. (2) in an action tried by him without a jury.

The action was upon a policy of marine insurance. The facts are fully stated in the judgment of Bigham J. in the Court below, but may for the purposes of this report be more briefly stated as follows. On October 18, 1898, brokers at Lloyd's effected, on behalf of the owners of a ship called the *Merrimac*, with Messrs. Gray, Dawes & Co.'s underwriters a policy in the ordinary form of a Lloyd's policy for 4200*l.* on hull and machinery for twelve months from October 18, 1898, to October 18, 1899. The policy contained the following clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium to the within." Gray, Dawes & Co.'s underwriters reinsured 1050*l.*

(1) See now Finance Act, 1901 (1 Edw. 7, c. 7), s. 11.

(2) [1901] 2 K. B. 567.

of the 4200*l*. with the plaintiffs for the same period against total loss only. This insurance was also in the ordinary form of a Lloyd's policy, and was expressed to be "a reinsurance of Gray, Dawes & Co.'s underwriters subject to terms, pro ratâ returns, continuation, valuation, clauses, and conditions of the original policy or policies, and to pay as may be paid thereon." By the policy sued on dated October 22, 1898, which was also for the same period and in the ordinary form of a Lloyd's policy, the plaintiffs reinsured 750*l*. of their 1050*l*. with the defendants, a Swedish company, who executed the policy in Sweden. This policy contained the following clauses: "Continuation clause as per original policy," and "subject to all the same clauses, terms, conditions, continuations, &c., that do or shall attach to the original policy $\frac{\text{and}}{\text{or}}$ policies, and to pay $\frac{\text{and}}{\text{or}}$ receive as may be paid $\frac{\text{and}}{\text{or}}$ received thereon, anything herein to the contrary notwithstanding. All claims $\frac{\text{and}}{\text{or}}$ losses payable in London. In the event of claim the Vega Company agree and undertake to pay upon the claim-note of the Royal Exchange Assurance Corporation, stating such claim to have already been settled by same. In case of any dispute under this policy, the Vega Company agree to be bound in all things by the jurisdiction and decision of the English Law Courts." During the currency of the policies the *Merrimac* sustained heavy damage, and put into Quebec, where temporary repairs were effected with a view to bringing her home for permanent repairs. On October 25, 1899, after the expiration of the twelve months, she sailed from Quebec for the United Kingdom, and was totally lost on that voyage.

At the trial before Bigham J. the policy of reinsurance sued upon being tendered in evidence, the judge took the objection, following his own decision in *Charlesworth* v. *Faber* (1), that the policy was a time policy for more than twelve months, and therefore invalid under s. 93, sub-s. 3, of the Stamp Act, 1891 (2); and on further consideration (3) he held that to be so, and accordingly gave judgment for the defendants.

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(1) (1900) 5 Com. Cas. 408.

(2) By s. 93, sub-s. 3, of the Stamp Act, 1891, "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

(3) [1901] 2 K. B. 567.

J. A. Hamilton, K.C., and *A. H. Chaytor*, for the plaintiffs. This policy having been executed in Sweden by a Swedish company, primâ facie the presumption would be that the contract was to be governed by the law of that country, by which it would be valid. The clause in the policy, by which, in case of dispute, the defendants agree to be bound by the jurisdiction and decision of the English Law Courts, does not rebut that presumption as regards the validity of the contract, for the clause assumes its validity, and provides merely that it shall be enforced in an English Court, and its effect as to incidental matters determined according to English law. When an objection relates to a matter of English procedure, such as that an action will not lie on a contract because it is not in writing, then it will prevail in this country in regard to a foreign contract though no such objection applies in the country where the contract was made; but an agreement valid by the law of the country where it is made may be enforced here, although, if made here, it would have been void: see *Leroux* v. *Brown*. (1) Under the circumstances it may be inferred that there was an agreement between the parties that this objection to the validity of the policy should not be taken. The defendants did not originally raise the objection, which was taken by the judge; and the before-mentioned clause of the policy appears to imply an agreement that the policy shall be treated as valid; for, if the contract be a nullity, how can it be enforced and its meaning ascertained in an English Court? It would be absurd to say that the contract should be enforced in an English Court according to English law when by that law it was not capable of being enforced. The judge is no doubt bound, for the protection of the revenue, to take stamp objections, and no agreement between the parties as to those could bind him. The stamp objection in this case can be cured by payment of the stamp duty on the insurance contained

(1) (1852) 12 C. B. 801.

in the continuation clause and the penalty under s. 95. The objection to the validity of the contract under s. 93 of the Stamp Act, 1891, is not a stamp objection, and it is submitted that it is competent for the parties to agree not to raise it. It is clear that defences based on enactments relating to the maintenance of the action on the contract, such as the Statute of Frauds or the Statute of Limitations, may be waived by the party, for, unless they are pleaded, they cannot be set up. The enactment in question is analogous to such enactments. It is true that the statute here provides that the contract shall be invalid, but such a provision does not necessarily involve the conclusion that the parties may not agree between themselves not to take objection to its validity. In the case of some contracts it might no doubt be the duty of the judge to raise the objection to the validity of the contract himself, notwithstanding that the parties had agreed not to raise it, as, for instance, in the case of a contract which was grossly immoral or contrary to public policy. But the contract here is not of that nature.

Assuming that the policy is governed by English law, the instrument ought to be construed, if possible, so as not to render it invalid, but to give effect to the contract between the parties. This may be done in one of two ways. First, it may be construed, not as one time policy for more than twelve months, but as a time policy for twelve months followed by a voyage policy. For that purpose the continuation clause specifies the risk or adventure sufficiently to satisfy the requirements of s. 93, sub-s. 3. The termini of the voyage are the place where the ship may be at the expiration of the twelve months and her port of final destination in the United Kingdom or Europe. It is not necessary that the termini of the voyage should be actually named in the policy; it is enough if they can be ascertained from the terms of the policy by reference to the events which happened. In *Crocker* v. *Sturge* (1) and *Crocker* v. *General Insurance Company of Trieste* (2), though this point was not actually decided, it appears to have been assumed that such a description of a voyage was sufficient. In

(1) [1897] 1 Q. B. 330.

(2) (1897) 3 Com. Cas. 22.

the American case of *Folsom* v. *Merchants' Mutual Marine Insurance Co.* (1) an insurance "on the outfits of schooner *Pilot* for a fishing voyage to the Banks and back to a port of discharge in the United States" was held valid, and evidence that the vessel was at a certain port when the policy was executed, and there took on board the property insured, and sailed from thence on the voyage was admitted to determine the terminus a quo. In *Cleveland* v. *Union Insurance Co.* (2) the description "at and from Salem to any port or ports, place or places, backwards and forwards, round the globe, one or more times, during her stay and trade at all such places till her return to her port of discharge in the United States," was held sufficient.

[MATHEW L.J. Those were cases where there was a regular course of trade with regard to voyages of the kind in question, as, for instance, fishing and whaling voyages.]

[They also cited on this point *Way* v. *Modigliani*. (3)]

The case of *Home Marine Insurance Co.* v. *Smith* (4), which will be relied on for the defendants, is not an authority against the plaintiffs in this case. There the question was whether the sum insured was sufficiently specified, and it was held that it was not, because it was impossible to tell what amount might be declared on the document called an "open cover," the only limit being that the underwriters were not to be called on to pay more than 4000*l*. as regards any one ship. The case falls, as regards the stamp duty, within s. 94 of the Stamp Act, 1891, which provides for the case of a policy being made for a voyage and also for time, in which case it is chargeable with two stamps; or, if not within that clause, the case would come within the terms of s. 4 (*a*) of the Stamp Act, 1891, which provides for stamping an instrument containing or relating to several distinct matters with duty in respect of each of the matters.

Secondly, the instrument may be regarded as containing two distinct time policies: a definitive insurance for twelve months subject to that period being put an end to by a total loss, followed by a contingent contract of insurance for the period defined by the continuation clause. There is nothing in the Stamp Act to make it illegal to include two such time policies in one document. This is not really a case of one time policy made originally for a period exceeding twelve months, for the continuation clause does not come into operation unless the vessel happens to be at sea or abroad at the expiration of the twelve months.

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(1) (1854) 38 Maine, 414.

(2) (1811) 8 Mass. 308.

(3) (1787) 2 T. R. 30; 1 R. R. 412.

(4) [1898] 2 Q. B. 351.

Scrutton, K.C., and *Theobald Mathew*, for the defendants. There is no evidence of any agreement not to raise the objection to the validity of the contract, and such an agreement could not bind the judge where a statute declares a contract null and void.

The principle laid down in *Hamlyn* v. *Talisker Distillery* (1) and in other cases is that, when a contract is entered into between parties residing in different countries, in which different systems of law prevail, the question as to which system of law is to govern the contract depends upon the intention of the parties to be gathered from all the terms of the contract and the circumstances under which it was made. Applying that test to the present case, the place of payment was in England; this was a reinsurance upon an English insurance; an English form of policy was adopted; and the defendants therein agreed to be bound by the jurisdiction and decision of the English Law Courts. Under these circumstances the parties must be taken to have intended that English law should apply. Assuming that to be so, it is suggested for the plaintiffs that the instrument is a time policy followed by a voyage policy, or a time policy followed by another time policy. But in either case the risk or adventure covered by the continuation clause is not sufficiently specified to satisfy the requirements of s. 93, sub-s. 3. On the first hypothesis it is a voyage from some unknown place to any port of final destination within the United Kingdom or Europe. Under the terms of the clause the ship might apparently go on an all-round voyage to a series of ports after the expiration of the twelve months before coming to a port of final destination in the United Kingdom or Europe. *Home Marine Insurance Co.* v. *Smith* (1) is an authority to shew that it is not sufficient that there should be in the policy terms by which the risk may be ascertained by reference to subsequent events; there must be a definite description of the risk on the document. It is impossible from the terms of the continuation clause to say what is the voyage insured, for which the ship is to be fit and seaworthy, or what would be a deviation. Treating the continuation clause as a second time policy, the same objection applies, namely, that there is no sufficient description of the risk, there being no definite time specified. This instrument is not really two contracts of insurance. It is one time policy for more than twelve months. Sect. 94 of the Stamp Act, 1891, does not apply to this case. It contemplates what is called a mixed policy, one which is for time and a voyage concurrently, as, for instance, "at and from London to Cadiz for six months": see Arnould on Marine Insurance, 7th ed. vol. i. s. 443, p. 527; and it also contemplates an insurance for a voyage and more than thirty days after the ship's arrival at her destination. It does not contemplate a time policy followed by a voyage policy. This policy is not, as suggested by the plaintiffs, within s. 4 (*a*) of the Act as being an instrument containing or relating to several distinct matters. An instrument containing an insurance by the same underwriters of the interest of the same persons in the same ship at different successive periods is not an instrument containing or relating to several distinct matters within the section: see *Great Britain Steamship Premium Association* v. *Whyte* (2); *Allen* v. *Morrison*. (3)

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(1) [1894] A. C. 202.

J. A. Hamilton, K.C., in reply.

COLLINS M.R. Notwithstanding the able argument of the counsel for the plaintiffs, it appears to me that we must affirm the judgment of Bigham J. The action is brought by an insurance company, who had reinsured other persons in respect of a risk undertaken by them, and had in turn reinsured themselves with the defendants, a Swedish company. The plaintiffs have paid on their own policy, and they now seek to recover upon the policy effected by them with the defendants. The case came on for trial before Bigham J., and he, as he was bound to do under s. 14 of the Stamp Act, 1891, looked at the instrument which was being put in suit to see if it was properly stamped, and thereupon came to the conclusion that, having regard to other provisions of the Act, it was invalid, and could not be made the subject-matter of an action. The question is whether he was right in coming to that conclusion. That question mainly turns upon s. 93 of the Act, which provides that "(1.) a contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance. (2.) No policy of sea insurance made for time shall be made for any time exceeding twelve months. (3.) A policy of sea insurance shall not be valid, unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months." The concluding words can only refer to time policies. The question is whether the policy in this case complies with the requirements of that section, having regard to the terms of what has been called the "continuation clause." The policy itself is expressed to be for twelve months from October 18, 1898, to October 18, 1899, but in addition it incorporates the clause which causes the difficulty, and which is as follows: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium to the within." The question arises whether an insurance in these terms sufficiently defines the risk insured against to satisfy the terms of sub-s. 3 of s. 93 of the Stamp Act, 1891. What happened was this. The vessel insured on a voyage to America sustained severe sea damage, but succeeded in getting into Quebec. It was thought undesirable to repair her fully at Quebec, and temporary repairs were done to her there, in order to enable her to cross the Atlantic to some home port where she might be permanently repaired. She started from Quebec after the expiration of the twelve months, and was never heard of again. The policies of insurance upon her were put in force. The plaintiffs, as I have said, having paid on their own policy, sued the defendants in turn upon the policy of reinsurance with them. Bigham J. held that the policy was invalid as being a time policy made for a period exceeding twelve months. The plaintiffs' counsel contend that the policy is valid; and in support of that contention they put forward two alternative views. They say that there is first a time policy for twelve months, and that the continuation clause is really a voyage policy following upon the time policy; and, secondly, they contend that the document is a time policy for twelve months followed by another time policy. With regard to the first alternative, they are met by the difficulty that the supposed voyage policy does not define the places from and to which the voyage is to be. They must say that the terminus a quo is any locality of the earth, or perhaps I should say sea, where the vessel happens to be when the time policy expires, and the terminus ad quem is any port in the United Kingdom or Europe to which the vessel shall, after the expiration of the time policy, come as her port of final destination after possibly several intermediate stages. They contend that that is a sufficiently definite description of the risk or adventure to satisfy the terms of s. 93, sub-s. 3. It appears to me that this contention really ignores altogether the provision of the section, which requires a specification of the particular risk or adventure. To describe the risk as one which may begin anywhere and end at any time somewhere so indefinite as any port in the United Kingdom or Europe seems to me to be quite incompatible with the terms of the Act. The plaintiffs' counsel pressed upon us the view taken of somewhat similar descriptions in American cases; but, as my brother Mathew pointed out, in those cases the parties were dealing with a well-known course of trade with regard to vessels engaged in voyages of the kind insured, and, whether the view taken in those cases would be accepted in English law or not, they appear to me to be so far from the present case as to throw little light upon it. The plaintiffs' counsel sought to distinguish the case of *Home Marine Insurance Co.* v. *Smith.* (1) There the objection taken to the document was that it did not specify the sum insured, as required by s. 93, sub-s. 3, and it was held that, as the document in question did not define the sum further than by giving a certain limit which the sum to be paid by the underwriters as regards any one ship must not exceed, the sum was not specified so as to satisfy the terms of the section. I do not think that the plaintiffs' counsel succeeded in distinguishing that case satisfactorily. It applies, no doubt, to the amount insured, and not to the risk or adventure, but the principle upon which it was decided applies to the latter as much as the former. It appears to me that the termini of the voyage in the present case are just as indefinite as the sum insured was in that case. Bigham J. held that the policy in this case could not be made to satisfy the requirements of s. 93, sub-s. 3, on either of the hypotheses suggested by the plaintiffs. He dealt first with the hypothesis that the document was a time policy followed by a voyage policy, and pointed out the difficulty of including in one document a policy to which no implied warranty of seaworthiness attached, and another policy to which such a warranty did attach, and also that the voyage was not sufficiently defined, its termini not being specified. He then dealt with the alternative hypothesis, which was that the document was a time policy followed by another time policy, and held that, so construed, it was open to the same objection as on the former hypothesis, because the period of the second time policy was altogether undefined. On those grounds he held, and it seems to me rightly, that the policy construed according to either hypothesis was too indefinite to satisfy the exigency of the section.

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(1) [1898] 2 Q. B. 351.

(2) (1891) 19 R. 109.

(3) (1828) 8 B. & C. 565.

The plaintiffs' counsel further argued that under the circumstances it ought to be inferred that the parties had agreed that no such objection to the validity of the policy should be taken, and they somewhat faintly argued that, the defendants being a Swedish company, and the policy having been executed by them in Sweden, the question with reference to the validity of the contract must be determined according to Swedish law. I will deal with this latter point first. I think it is clear that in this case the parties did not intend to contract with reference to the Swedish law. They adopted a form of policy which is English, and it is expressly therein provided that, in case of any dispute under the policy, the Vega Company agree to be bound in all things by the jurisdiction and decision of the English Law Courts. I think, applying the principle laid down in *Hamlyn* v. *Talisker Distillery* (1), that, having regard to the terms of the contract and the circumstances, the inference is clear that the parties intended that their rights under the contract should be governed by English law. Then, with regard to the other point, if an agreement between the parties could be inferred that no objection to the policy based upon the provisions of the Stamp Act should be taken, such an agreement could not, when the case has come into an English Court, bind the judge in any way, it being his duty to take any objection that may arise under the Stamp Act. The plaintiffs' counsel agreed that the judge was bound to take the stamp objection, but said that objection could be cured by payment of the penalty. They urged, however, that the objection now in question is not a stamp objection properly so called, that is to say, an objection that the instrument is not properly stamped, but an objection to the validity of the policy. It appears to me that such an objection is an even greater difficulty in the plaintiffs' way than a stamp objection. Where an enactment, whether in a Stamp Act or any other Act, not merely negatives the existence in English law of a right to sue on an instrument, but nullifies the instrument itself, it is no more competent for the parties to bind the judge by an agreement with reference to such an objection than it is in the case of a stamp objection.

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(1) [1898] 2 Q. B. 351.

For these reasons I think that the judgment of Bigham J. was right, and this appeal must be dismissed.

MATHEW L.J. I am of the same opinion. The first question is whether or not, on the true construction of the policy, it is one time policy for a period exceeding twelve months. The original policy of insurance contained a clause, which is

(1) [1894] A. C. 202.

Mathew L.J.

commonly called a continuation clause, and the policy of reinsurance now sued upon incorporated that clause. It was expressed to be subject to all the clauses, terms, conditions, continuations, &c., which attached to the original policy. The continuation clause appears to me to be really an extension of the period of twelve months previously mentioned in the policy. It is one time policy throughout for the period of twelve months, and the additional time contemplated by this very extensive continuation clause. It was argued for the plaintiffs that, if any other construction of the document were possible, it ought to be adopted, in order to give effect to the contract between the parties, and that with that object the document ought to be treated as containing two policies. I do not believe the parties ever meant the document to include two contracts of insurance. But, supposing that it were possible so to treat it, the objection at once arises that the second of the supposed policies does not sufficiently specify the risk. The continuation clause is, "should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium to the within." No one could predict on the terms of this clause upon what voyage the ship might be sent at the expiration of the period of twelve months. If the word "abroad" were not in the clause, it might possibly be held only to cover some voyage incomplete at the expiration of the twelve months. But, as it stands, the effect is far more extensive, and the clause appears to leave it open to the shipowner on the expiration of the twelve months to send the ship on whatever voyage he chooses, ending in a port of final destination anywhere in the United Kingdom or Europe. In my opinion such a policy is too indefinite to be regarded as complying with the condition of the Act which requires the particular risk to be specified. That being so, I entirely agree with the judgment of Bigham J.

It is said that we ought to make every effort to uphold the contract, and that under the circumstances an agreement by the parties may be inferred that the objection to the validity of the document should not be raised. It is enough to say that, if there were such an agreement, it would not help the plaintiffs. The parties cannot agree between themselves that the judge shall not perform his duty. It is his duty to determine whether the document is properly stamped, or can be properly stamped. There does not however appear to me to be any foundation for the suggestion of an agreement not to raise this objection. With regard to the contention that this policy was made with reference to Swedish law, there is an express stipulation in it that in case of any dispute under the policy the defendants agree to be bound in all things by the jurisdiction and decision of the English Law Courts. That excludes, in my opinion, the operation of any other law than the English law with reference to this policy.

Cozens-Hardy L.J. I agree with the judgments of the Master of the Rolls and my brother Mathew, and have very little to add. If the plaintiffs' counsel could make out that the law of Sweden applied to this policy, different considerations would arise. But in my opinion they fail to make that out. The policy was executed in Sweden, but the place where the contract was made is not conclusive to shew that the law of that place applies. The place of payment was to be in England, but that again is not conclusive. We have to gather the intention of the parties as to what law is to apply from the terms of the document and the circumstances under which it was executed. The policy is in the form of a Lloyd's policy. It is a policy of reinsurance adopting with the necessary modifications the terms of the original policy, which was English, and it contains the clause with regard to the defendants' being bound by the jurisdiction and decision of the English Law Courts to which the Master of the Rolls and my brother Mathew have referred. It seems to me clear from the language of the document and the circumstances that the parties intended that their rights under the contract should be governed by English law as administered by an English Court. Sect. 93 of the Stamp Act, 1891, provides that, in a case where its requirements are not satisfied, a document which appears to be, and otherwise

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would be a contract, shall be a nullity. When that is the case, no agreement between the parties can make it good, or relieve the judge from the obligation of treating it as a nullity. I think that the judgment of Bigham J. was right and should be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Son, Coward & Hawksley.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

E. L.

BAILEY *v.* THURSTON & CO.

1902
May 4, 10.

Bankruptcy—After-acquired Property—Contract of Employment made before Bankruptcy—Right of Bankrupt to Sue for Wrongful Dismissal—Intervention of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

An undischarged bankrupt, employed as traveller for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for damages for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in the bankruptcy not having intervened in the action.

FURTHER CONSIDERATION, in an action tried before Phillimore J. and a jury.

The action was to recover damages for the wrongful dismissal of the plaintiff from his employment by the defendants.

One of the defences pleaded was that the plaintiff was adjudicated a bankrupt before the action was brought, and remained an undischarged bankrupt when it was brought.

The facts proved or admitted at the trial were, so far as material for the purposes of this report, as follows: By an agreement in writing dated April 24, 1899, the defendants, who carried on the business of manufacturers of billiard tables, agreed to employ the plaintiff, and he agreed to serve them, as their traveller for a period of five years from April 17, 1899, at a salary, to be paid weekly, and commission, to be paid monthly, on all orders procured by him for them. Early in the month of June, 1901, the plaintiff was adjudicated bankrupt. Subsequently, on June 29, 1901, the defendants dismissed him from

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their employment, and he thereupon brought his action for wrongful dismissal, being then an undischarged bankrupt. The jury gave a verdict for the plaintiff, damages 100*l.*; and on an application for judgment Phillimore J. adjourned the case for further consideration.

E. W. Hansell (*Kemp, K.C.*, with him), for the defendants. The plaintiff cannot maintain this action. His contract of employment with the defendants was property which, on his bankruptcy, passed to the trustee under s. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). All the plaintiff's rights under that contract, including the right to recover damages for a breach occurring after the bankruptcy, passed also to the trustee, who alone can sue for those damages. The only exception to the rule that the trustee is entitled to all the property belonging to the bankrupt at the commencement of the bankruptcy, or which may be acquired by or devolve upon him before his discharge, is with respect to such personal earnings of the bankrupt as are necessary for the support of himself and his family: *Wadling* v. *Oliphant* (1); *Emden* v. *Carte* (2); *Beckham* v. *Drake* (3); *Elliott* v. *Clayton* (4); *In re Roberts.* (5) *Cohen* v. *Mitchell* (6) only decided that transactions entered into by the bankrupt with respect to property acquired during the bankruptcy were, under certain circumstances, binding as against his trustee. In *Emden* v. *Carte* (2) the order of events was the same as it is here, and that case is a distinct authority in the defendants' favour. The trustee has not intervened, as he could have done, and the plaintiff's bankruptcy is, therefore, a good answer to the claim.

Lord Coleridge, K.C., and *Macoun*, for the plaintiff. The plaintiff is entitled to maintain this action. It is unnecessary to deny that the trustee could have intervened; but the fact that he did not intervene does not prevent the action being maintainable by the plaintiff. In *Herbert* v. *Sayer* (7) it was

(1) (1875) 1 Q. B. D. 145.

(2) (1881) 17 Ch. D. 169, 768.

(3) (1849) 2 H. L. C. 579.

(4) (1851) 16 Q. B. 581; 20 L. J. (Q.B.) 217.

(5) [1900] 1 Q. B. 122.

(6) (1890) 25 Q. B. D. 262.

(7) (1844) 5 Q. B. 965; 13 L. J. (Q.B.) 209.

held that an uncertificated bankrupt might sue in respect of property and contracts acquired and made by him during his bankruptcy, and that a plea of bankruptcy constituted no defence unless it alleged that the bankrupt's assignees had interfered. That decision has been approved by the Court of Appeal in *Jameson* v. *Brick and Stone Co., Ld.* (1): see also *Cook* v. *Whellock.* (2) *Emden* v, *Carte* (3) and the other cases cited for the defendants are distinguishable. They did not decide that an action could not be maintained by the bankrupt. The question only was whether the trustee was the right plaintiff. Here the contract between the defendants and the plaintiff was determined when they discharged him from their employment. The plaintiff is not claiming under the contract, and his right of action did not accrue until after the commencement of the bankruptcy. If that be so, it is clear on the authorities that he is entitled to sue alone in respect of it.

E. W. Hansell replied.

Cur. adv. vult.

May 10. PHILLIMORE J. (after stating the facts). The point raised by the defendant company is one, in my opinion, not covered by authority, and requiring nice consideration. Up to a point the authorities are clear, and I do not refer to them because I think the conclusions they have established are settled. All property, with certain immaterial exceptions, vested in a bankrupt at the date of his bankruptcy passes to his trustee, and the bankrupt cannot sue for or in respect of it. Property which a bankrupt acquires after bankruptcy he can sue for or in respect of; but his trustee can at any time intervene and claim the proceeds. But, if the property is property or money due to the bankrupt for his personal earnings—that is, wages or salary—all of it, or at any rate enough of it for him to live upon, must be left to him by his trustee. If the trustee do not interfere in the course of an action brought by the bankrupt, but finds the bankrupt in possession of money acquired by means of the action, he can take that money from him,

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(1) (1878) 4 Q. B. D. 208.

(2) (1890) 24 Q. B. D. 368.

(3) 17 Ch. D. 169, 768.

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with the same reservation. Now, a valuable contract made by a bankrupt before bankruptcy is property belonging to him which passes on bankruptcy to his trustee. If money has become due under the contract before the date of the bankruptcy, and has not been paid, it is for the trustee, and not for the bankrupt, to sue for it. So, too, if the money does not become payable till after the date of the bankruptcy. In the present case it was contended for the plaintiff that his cause of action was the breach of the contract; that the breach did not occur, and the cause of action did not accrue, until after the bankruptcy, and therefore that the cause of action could be sued upon by the bankrupt subject to the right of his trustee to intervene. I think that is not the true way of looking at the matter. The only method by which the benefits secured by a contract can be obtained, where an action for specific performance does not lie, is by claiming damages for the non-performance or breach. Where the contract is for the purchase of an annuity, or for a periodical delivery of goods, it passes to the trustee on bankruptcy, which means that he has the benefit of it. But how is he to have the benefit of it unless he, and he alone, can maintain an action for each annual payment, or for damages for each failure to deliver as the periods come round? In each case his cause of action is for breach of covenant or agreement, though in the one case the damages are liquidated, and in the other unliquidated. If the contract has been made before the bankruptcy and the bankrupt before bankruptcy has performed his part, so that he and his trustee have nothing to do or give, but only something to take or receive, it seems to me it matters nothing that the breach occurs after the bankruptcy. The contract with the right of enforcing it has passed to the trustee, and he, and he alone, can sue. But it may be otherwise if the bankrupt has something on his part to do, and specifically it may be otherwise if the contract is for personal employment of the bankrupt at a salary or wages. If under such a contract the bankrupt continues to be employed and default is made in paying his periodical salary or weekly wages, it would seem to be in accordance with principle that the bankrupt should be able to sue unless his trustee has previously sued, and subject to the right of his trustee to intervene, just as the bankrupt would be able to sue on a new contract of employment made after bankruptcy. I should so hold. Now, what is an action for wrongful dismissal? There are cases under contracts of employment where the proper step for a party to take is to tender his services and then sue for the agreed sum. But when a servant is dismissed it would be absurd that he should attend day by day and week by week, and offer his services, and stand idle, and then sue as the periods of demand come round. The law says it is his duty to accept his dismissal as a fact, and to seek for other employment; and only if and so far as he does not obtain equally remunerative employment is he given damages. The measure of damages in such an action is arrived at in this way—first, the wages or salary are claimed with the discount for prompt payment in one lump sum, and with allowance, when the period of contractual service is a long one, for all the accidents of life which might have ensued to prevent the earning of the full sum; secondly, from this calculation is deducted what the plaintiff has earned, or might have earned, by being set free from his contractual services. An action for wrongful dismissal is an action to recover those personal earnings which the bankrupt was entitled to make for himself; and, if his trustee has not already sued or claimed for him, and subject to the trustee's right of intervention during the action, it can, I think, be maintained by a bankrupt. The cases do not seem to have covered this point, and are therefore not in conflict with my decision. In *Elliot* v. *Clayton* (1) the plea included an averment that the assignee in bankruptcy had previously claimed the debt, and Mr. Bramwell in arguing for the successful defendant made a point of this, though it was not specifically alluded to in the judgment. In *Emden* v. *Carte* (2) the language of Fry J. (3) is, I think, rather favourable to my view than otherwise. It is true that the language of Jessel M.R. and Lush L.J. in the Court of Appeal is apparently very much the other way; but

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(1) 16 Q. B. 581; 20 L. J. (Q.B.) 217.

(2) 17 Ch. D. 169, 768.

(3) 17 Ch. D. at pp. 171, 172, 173.

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it must be remembered that this point was not before them. The defendant, according to the report, was not represented before the Court of Appeal. The Court was not deciding whether there could be any recovery from him, but which of two—the bankrupt or his trustee—should recover. Moreover, if there was no cause of action against the defendant, the intervention of the plaintiff's trustee was idle, because there was nothing for which it was worth his while to intervene. I thought it important to see the form of the order made by Fry J., and I have sent for and seen the registrar's book. It records that, upon the trustee in bankruptcy, who was the applicant, undertaking not to apply until the expiration of twenty-eight days from the date of the order for payment out of the fund in court, or to file any further pleadings without the consent of the plaintiff, Walsh Emden, the Court ordered that the name of the applicant be added as a plaintiff in the action as trustee in the pending bankruptcy of the original plaintiff, and that the further conduct of the action on the part of the original plaintiff be given to the applicant, and he was ordered to pay the defendant his costs of the application. That order shews that it was assumed or admitted that there was a cause of action on which the bankrupt could sue. It may be said that it was not worth the defendant's while to take the objection, because it would only result in a fresh action being brought by the trustee; but it would be worth his while to get his costs up to that date, and it appears that the case had proceeded a considerable way and considerable costs must have been incurred. But, however that may be, the defendant did not raise the point; the order made in the action was made upon the footing that the bankrupt could sue the defendant, and so far the case is an authority in favour of the plaintiff here.

I give judgment for the plaintiff.

Judgment for plaintiff.

Solicitor for plaintiff: *Charles Goble Champion.*

Solicitors for defendants: *Gush, Phillips, Walters & Williams.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1902
July 9, 11.

In re JAMES EDGCOME.
Ex parte JAMES EDGCOME.

Bankruptcy—Committal—Non-payment of Rates—Imprisonment—Receiving Order—Release—Jurisdiction—Legal Process—Punitive Order—Distress for Rates Act, 1849 (12 & 13 *Vict. c.* 14), *s.* 2—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 2—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 10, *sub-s.* 2.

A commitment under the Distress for Rates Act, 1849, s. 2, for one month, unless the money should be sooner paid, is a punitive order, and is not a legal process to enforce payment within s. 10, sub-s. 2, of the Bankruptcy Act, 1883, so as to enable the Court of Bankruptcy under that sub-section to discharge the debtor from prison on the ground that whilst in prison a receiving order has been made against him.

Appeal from a decision of one of the registrars of the Court of Bankruptcy.

James Edgcome was the occupier of 12, St. James's Square, in the city of Westminster, and was duly rated and assessed to the general rate of the parish of St. James. He thus became liable to pay a sum of 174*l.* 16*s.* 4¼*d.* under a general rate made on April 12, 1901, and he did not pay this sum or any part of it. On September 19, 1901, a distress warrant was issued by the magistrate of the Great Marlborough Street Police Court directing a levy of the sum of 174*l.* 16*s.* 4¼*d.* by distress and sale of Edgcome's goods and chattels. A return of nulla bona was made, and on March 10, 1902, a warrant of commitment in default of distress was issued by the magistrate in the usual form under the schedule to the Distress for Rates Act, 1849, directing that Edgcome should be imprisoned in Holloway Prison for one month, "unless the said sum of 174*l.* 16*s.* 4¼*d.*," together with the costs, "shall be sooner paid." The committal warrant was directed to be held over for a month, and was eventually executed on July 1, when Edgcome was imprisoned at Holloway. On July 2 he presented a bankruptcy petition, and on the same day a receiving order was made against him on that petition. On July 4 he applied to the registrar in bankruptcy for an order that he should be released from prison under ss. 9 and 10 of the Bankruptcy Act, 1883, on the ground that the receiving order had been made. On July 5 the registrar dismissed the application; and the debtor appealed.

Haldinstein, for the appellant. The Court of Bankruptcy has jurisdiction under s. 10, sub-s. 2, of the Bankruptcy Act, 1883, to order the release of the appellant from prison. Sect. 9 does not apply to proceedings pending against the debtor at the date of the receiving order: *In re Berry*. (1) Pending proceedings are dealt with by s. 10, sub-s. 2 of which applies to any time after the presentation of a bankruptcy petition. By that sub-section "the Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just." The magistrate cannot discharge the prisoner by any review of his decision, though it might be possible to apply to the Home Secretary: *Jones* v. *Williams* (2); so the debtor's only remedy is to apply to the Bankruptcy Court. The committal is not punitive: it is a "legal process against the person of the debtor." Sect. 4 of the Debtors Act, 1869, abolishes imprisonment for debt with certain exceptions, and this case comes under sub-s. 2, which excepts "default in payment of any sum recoverable summarily before a justice or justices of the peace." There have been several decisions that orders made under this section are punitive orders, and not merely legal process to enforce payment of the debt; but they have all been cases under other sub-sections, and do not apply to payment of rates. The only case on sub-s. 2 is *Reg.* v. *Pratt* (3), and it was only a question whether certain costs came within the sub-section. In *Stonor* v. *Fowle* (4), which was a county court case under

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(1) [1896] 1 Ch. 939, 946.

(2) (1877) 46 L. J. (M.C.) 270.

(3) (1870) L. R. 5 Q. B. 176.

(4) (1887) 13 App. Cas. 20.

s. 5 of the Debtors Act, 1869, it was held that the committal was punitive; but s. 5 is guarded by provisions which do not apply to s. 4. It is not suggested that Edgcome had the means and refused to pay. Even if he had any money, he could not pay when a receiving order had been made. He ought not to be kept in prison now that his assets are not in his own power. That is shewn by Order xxv., rr. 29, 30, 31 of the County Court Rules, 1889. Those rules are by rule 361 of the Bankruptcy Rules, 1886, made applicable to all Courts exercising jurisdiction under s. 5 of the Debtors Act, 1869. The magistrate's jurisdiction arises under s. 2 of the Distress for Rates Act, 1849, which gives power to commit to prison for any time not exceeding three months any person who fails to pay rates; and the order for commitment is qualified by the direction that Edgcome is to be imprisoned for a month unless he pays the debt. Therefore it is clear that the policy of the law is that a debtor shall not be imprisoned in default of distress for rates if he is a bankrupt. The Court of Bankruptcy has a discretion whether it will discharge the prisoner or not, and will exercise it in favour of the appellant. This is a hard case; Edgcome occupied the house only as secretary of a club, and he ought not to be called upon to pay these rates.

Muir Mackenzie, for the mayor and corporation of Westminster. The learned registrar refused the application on the ground that the order was in its nature punitive, and he followed *In re Smith*, *Hands* v. *Andrews* (1); and, secondly, he refused it in the exercise of his discretion because there was no evidence before him except that there had been a committal, and that the debtor had filed his petition the next day.

On the question of jurisdiction it is submitted that the order is punitive, and the Bankruptcy Court cannot interfere. Before 1849 imprisonment for non-payment of poor-rates was governed by the Poor Relief Act, 1601 (43 Eliz. c. 2), recited in s. 2 of the Distress for Rates Act, 1849, which allowed imprisonment for an indefinite time until payment. By s. 2 of the latter Act, which has been partly repealed by the Statute Law Revision Act, 1875, the time is cut down to three months. The magistrate

(1) [1893] 2 Ch. 1.

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may make the order or may not, and he fixes the time in his discretion: that shews that it is punitive. An order under s. 4, sub-s. 2, of the Debtors Act, 1869, is punitive. Orders under the other sub-sections and under s. 5 are punitive, and there is no distinction between them and sub-s. 2: *Stonor* v. *Fowle* (1); *In re Nuthall* (2); *In re Smith, Hands* v. *Andrews* (3), which followed *Middleton* v. *Chichester*. (4) Those cases shew that the qualification that the debtor shall be discharged if he pays the debt does not prevent the order from being punitive. The provision for the recovery of poor-rates under the Poor Relief Act, 1601, was purely legal process; but that has been intentionally altered by the Acts of 1849 and 1869.

Haldinstein replied.

Cur. adv. vult.

VAUGHAN WILLIAMS L.J. In this case we think that the appeal from the registrar must fail. I confess that I have arrived at that conclusion with some reluctance, and my reluctance is based upon this—that in the application of the Debtors Act, and the effect thereon of the making of a receiving order, it does not seem to me that the decisions of the Courts and the rules that have been made with reference thereto all follow the same principle. But that is not what we have to consider. We have to determine whether this case is really covered by authority, and whether or not those authorities are right and consistent with the view that has been taken in other respects of the Debtors Act. It is our duty if this case is covered by authority to act upon that authority. [The Lord Justice referred to the facts, and continued:—]

The section upon which the appellant relies is s. 10, sub-s. 2, of the Bankruptcy Act, 1883. [The Lord Justice read it.] It is said that this process, which has resulted in the order for imprisonment for one month, is legal process against the property or person of the debtor for the purpose of enforcing payment of these rates, and therefore that the Court in Bankruptcy has jurisdiction either to allow or to prohibit the continuance of the process. Whether that is so or not depends

(1) 13 App. Cas. 20.
(2) (1891) 8 Mor. 106.
(3) [1893] 2 Ch. 1.
(4) (1871) L. R. 6 Ch. 152.

upon whether the imprisonment which has been ordered is imprisonment intended as a means of enforcing payment, or whether it is intended as a punishment. If it is intended as a punishment, there is no jurisdiction under s. 10 to order the discharge of the bankrupt from his imprisonment. Now there can be no doubt that, if the law as it was expressed by Mellish L.J. in *Cobham* v. *Dalton* (1) is still to be regarded as law, we must treat this order for imprisonment merely as process instituted for the purpose of enforcing payment of a debt, because he says, speaking generally of arrest for debt, that it "is intended as a means of enforcing payment, not as a punishment," and he gives as a proof of that this fact: "for if the party pays the debt he is entitled to be discharged." The Distress for Rates Act, 1849, s. 2 of which gives the power of committal to prison for non-payment of rates, recites that by the Poor Relief Act, 1601, a power of imprisonment was given not for a limited time, but a power to commit the party to gaol "there to remain without bail or mainprize until payment"; and the Act goes on to authorize a person in default of payment "to be imprisoned in the common gaol or house of correction for any time not exceeding three calendar months unless the sum or sums therein mentioned shall be sooner paid." If we could apply the observations of Mellish L.J. and the reason which he gives for treating the arrest as a mere means of enforcing payment, it would follow that in this case we should have to treat the order as a mere means of enforcing payment; for undoubtedly on the terms of the section and on the face of the warrant the debtor is entitled to his discharge on payment of the debt. But if we look at the authorities, it seems that we must not regard that observation of Mellish L.J. as being still law. The general effect of the Debtors Act, 1869, is this. Sect. 4 says: "with the exceptions hereinafter mentioned no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." There is a general abolition of imprisonment for debt subject only to the exceptions which follow, which are: (1.) default in payment of a penalty; (2.) "default in payment

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(1) (1875) L. R. 10 Ch. 655, 657.

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of any sum recoverable summarily before a justice or justices of the peace"—that is this case; (3.) default of a person acting in a fiduciary capacity.

I need not read them all, but there is a list of exceptions as to which the liability to imprisonment is continued, notwithstanding the general abolition of imprisonment for debt. It is right to observe in passing that there is another saving on this general abolition of imprisonment, and that is under the 5th section, which provides that, "subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court"; and amongst the conditions under which that order may be made one finds, in sub-s. 2, "that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same."

Lord Hatherley, in *Middleton* v. *Chichester* (1), considers the exceptions in s. 4 under which the liability to imprisonment still continues. He says this (2): "Now the first exception is the case of a penalty, and that makes the distinction I have pointed out extremely clear, because if it is merely a penalty in respect of a contract, that is not to deprive the person who has incurred it of the benefit of the section; but if it is any other sort of penalty, by which is meant a penalty for non-observance of a positive law, then he is to be exempted from the benefit of the section. The second exception is default in payment of any sum recoverable summarily before a justice or justices of the peace. That again would be something in the nature of a penalty and not in the nature of a simple debt." He goes on to deal with the other exceptions—I need not read what he says at length, but he mentions the case of default by a trustee and misconduct by a solicitor—and he says (1): "Therefore, in every case there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference, with reference to the question of delinquency, whether a person has the money in his possession at the time the order is made or had parted with it some short time before the making of the order." The view of Lord Hatherley undoubtedly was that each one of the exceptions in s. 4 retained imprisonment, because the Legislature treated each of the cases as one in which there was a delinquency, and that the imprisonment was therefore a punishment, and differed from a mere process for the recovery of a debt. Later on, in 1893, this question had to be considered again in the Court of Appeal in *In re Smith, Hands* v. *Andrews* (2), where Lindley L.J. says: "Although *Cobham* v. *Dalton* (3) was decided in 1875, and *Middleton* v. *Chichester* (4) was decided in 1871, and the Lords Justices who decided *Cobham* v. *Dalton* (3) were members of the Court which decided *Middleton* v. *Chichester* (4), the view there taken and expressed with reference to the punitive character of s. 4 of the Debtors Act, 1869, seems to have been overlooked by them." It will be observed that he is not there speaking of any particular sub-section, but generally of s. 4. He continues: "Lord Justice James does not allude to it; Lord Justice Mellish said: 'Now arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged.' This observation was true of ordinary debts: *In re M'Williams* (5); *Lees* v. *Newton* (6), but not of obligations to pay under orders made under s. 4, sub-s. 3, of the Debtors Act, 1869. The punitive character of s. 4 of the Debtors Act, 1869, which was pointed out in *Middleton* v. *Chichester* (4), has been since so often recognised that it cannot now be questioned." He cites some cases, and goes on to say: "In all these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised. Having regard to the Debtors Act, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply Lord Justice Mellish's observation in *Cobham* v. *Dalton* (1), above quoted, to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4, sub-s. 3."

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(1) L. R. 6 Ch. 152.

(2) L. R. 6 Ch. at p. 156.

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(1) L. R. 6 Ch. at p. 157.
(2) [1893] 2 Ch. 1, 17.
(3) L. R. 10 Ch. 655.
(4) L. R. 6 Ch. 152.
(5) (1803) 1 Sch. & Lef. 169.
(6) (1866) L. R. 1 C. P. 658.

It is quite true that, when he goes on to say what they should do with the case then before the Court, he speaks only of s. 4, sub-s. 3, that being the one which deals with trustees who have had trust funds in their possession; but I have read the whole passage in order that it may be seen clearly that, although his language at last only applies to sub-s. 3, the principle in terms applies to the whole of the exceptions in s. 4, and not only to sub-s. 3. In other words, Lindley L.J. did what Lord Hatherley had so carefully and plainly done in *Middleton* v. *Chichester* (2), where he went through one by one every one of the exceptions to s. 4, and pointed out that they were all punitive, and not to be treated as process for enforcing payment of the debt. Under these circumstances I think we have no choice but to treat this as a punitive order, and one from the stringency of which James Edgcome cannot obtain relief under s. 10 of the Bankruptcy Act.

I think this is unsatisfactory, because it is plain that the practice as to non-application of relief under the Bankruptcy Act to these cases, as to which imprisonment has been continued by the Debtors Act, has not been consistently followed. It is obvious that s. 5 is just as much an exception from the general abolition of imprisonment for debt as s. 4. The exception is put in a different section because it is a section which deals with the power of the Court to commit a debtor to prison for non-payment of a judgment debt; and when one looks at the conditions under which such an order is allowed to be made, it is perfectly plain that they can only be made when there is a contumacious debtor who has the means, or has had the means, to pay the debt, and his conduct is in the nature of contempt. This imprisonment is for a fixed time not exceeding six weeks, and is a punishment for the contempt, and the suffering of that imprisonment in no way discharges the debt, and one would have thought that if the principles I have been dealing with had been applied consistently, the result would have been that no relief could be given under ss. 9 and 10 of the Bankruptcy Act after a receiving order had been made. That is not the case. So far from that, under the County Court Rules of 1889, which have been made applicable to all Courts with jurisdiction in respect of judgment debtors' summonses, by Order xxv., r. 29, "Where a judgment debtor shall upon the return day of a judgment summons satisfy the judge that a receiving order has been made for the protection of his estate, or that he has been adjudicated bankrupt, and that the debt was provable in the bankruptcy . . . . no order of commitment shall be made except in accordance with the provisions of the last-mentioned section" (s. 122 of the Bankruptcy Act, 1883).

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(1) L. R. 10 Ch. 655.

(2) L. R. 6 Ch. 152.

Under these circumstances it does seem to me a little unfortunate that the same principle has not been acted on with regard to exceptions under s. 5 that has been acted on with regard to exceptions under s. 4, although one would have said that if any of these exceptions were in respect of the conduct of the debtor being such as merited punishment, they would have been those under s. 5. However, we have not to deal with that here.

The result is that in respect of this particular debt, a debt for rates, the getting of a receiving order does not entitle the debtor to ask for relief under these sections of the Bankruptcy Act, notwithstanding the fact that at any time during the imprisonment he could get rid of the imprisonment by payment of the debt. Notwithstanding that, it seems to me that unless we disregard *Middleton* v. *Chichester* (1) and *In re Smith, Hands* v. *Andrews* (2), we are bound to say, with regard to the exceptions in each one of the sub-sections of s. 4, that the orders are punitive orders. The appeal must be dismissed.

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(1) L. R. 6 Ch. 152.

(2) [1893] 2 Ch. 1.

ROMER L.J. I also think that this appeal fails.

It is true that a committal under an order of a magistrate, if and when made under the statute 12 & 13 Vict. c. 14, terminates on payment by the debtor; but the committal, nevertheless, is of a punitive character, and not merely a legal process to compel payment. That is made clear by the express provision of the Act; for by the Act a discretion is given to the magistrate as to whether he will or will not commit, and, if he does commit, a discretion as to the period for which he will commit not exceeding three months. To my mind, in making an order under the Act the magistrate is bound to exercise his discretion, and in so doing he must have regard to the existing circumstances, and must consider what under those circumstances, if the money is not paid, the duration of the imprisonment ought to be. That shews that it is something in the nature of a punishment apart from legal process to procure payment. If the order is punitive, the Court of Bankruptcy has no power to interfere. The same view is arrived at by a consideration of s. 4 of the Debtors Act, 1869. The exceptions there mentioned from the general rule that there shall be no imprisonment for debt form a class of cases standing on the same footing; and they were excepted because imprisonment under them all was meant to be a punishment. That was the view expressed by Lord Hatherley in *Middleton* v. *Chichester* (1) and by Lindley L.J. in *In re Smith, Hands* v. *Andrews* (2), and also by Jessel M.R. in *Marris* v. *Ingram.* (3)

STIRLING L.J. I am of the same opinion and for the same reasons, but I should like to add this. This case is one of rates, and depends on particular statutes. If it were an isolated case one might have supposed that it had escaped the notice of those who framed the Debtors Act, 1869; but in truth there is a large class of orders of the same kind which can be made by magistrates; for instance, with reference to costs which, under s. 18 of the Summary Jurisdiction Act, 1848 (11 & 12

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(1) L. R. 6 Ch. 152.

(2) [1893] 2 Ch. 1.

(3) (1879) 13 Ch. D. 338.

Vict. c. 43), are made recoverable by imprisonment with or without hard labour for any time not exceeding one calendar month, unless such costs be sooner paid: see also s. 19 of the same Act. I think that this is not an isolated case, and that the appeal must fail.

Appeal dismissed.

Solicitors: *R. G. Davis; Caprons, Hitchins, Brabant & Hitchins.*

H. C. R.

SCOBLE AND OTHERS *v.* THE SECRETARY OF STATE IN COUNCIL FOR INDIA.

1902
June 16.

Revenue—Income Tax—Annuity—Purchase-money—Payment by Annual Instalments with Interest—Income Tax Acts (5 & 6 *Vict. c.* 35; 16 & 17 *Vict. c.* 34), *Scheds. C and D.*

By a contract, made in 1849 between the East India Company and the Great Indian Peninsula Railway Company, it was agreed that at the expiration of fifty years therefrom it should be lawful for the East India Company, on notice to the railway company, to purchase from them their railway at a price representing the full amount of the value of all the shares or capital stock of the railway company, and that if and when the East India Company should become liable under the contract to pay for the purchase of the railway it should be lawful for them, instead of paying a gross sum therefor, to declare, by notice to the railway company, their option to pay an "annuity," to commence from the time when the gross amount would be payable and to continue during the residue of a term of ninety-nine years, the rate of interest to be used in calculating the annuity to be determined as therein specified. At the expiration of the fifty years the Secretary of State for India, in whom the powers exercisable by the East India Company under the contract had become vested, gave notice to the railway company of his intention to purchase the railway, and the price was determined and became payable. The Secretary of State thereupon duly declared his option to pay an annuity, and the rate of interest to be used in calculating the annuity was duly fixed. The annuity was paid half-yearly, each payment representing, as to a part of it, an instalment of the price paid for the railway, and, as to the residue, interest on the amount of the price for the time being unpaid. This arrangement was sanctioned by a local Act, which provided that the Secretary of State should pay the annuity to certain trustees appointed on behalf of the shareholders of the railway company:—

Held, that this was an "annuity" within the meaning of Sched. C of the Income Tax Acts, and, therefore, that income tax was payable upon the whole amount of each half-yearly payment, and not merely upon so much of it as represented interest.

Foley v. *Fletcher*, (1858) 3 H. & N. 769; 28 L. J. (Ex.) 100, distinguished.

ACTION tried before Phillimore J.

The action was brought to recover two sums of 8122*l.* 10*s.* 8*d.* and 9611*l.* 6*s.* 6*d.* respectively, alleged to have been wrongfully deducted and retained for income tax by the Secretary of State for India out of an annuity payable by him to the plaintiffs.

The following material facts were admitted at the trial:—

The plaintiffs are the annuity trustees referred to in the Great Indian Peninsula Railway Purchase Act, 1900 (63 & 64 Vict. c. cxxxviii.) (Local).

By a contract dated August 17, 1849, made between the East India Company of the one part, and the Great Indian Peninsula Railway Company of the other part, it was agreed that the East India Company should provide land for a railway to be constructed by the railway company, and that the railway company should construct a railway on that land, and that on the completion thereof the East India Company should grant to the railway company a lease of, or otherwise secure to the railway company a right and title to, that land for a term of ninety-nine years commencing from August 17, 1849, unless the same should be sooner determined under the provisions contained in the contract. Clause 23 of the contract provided: "That at any time within six calendar months after the expiration of the first twenty-five years of the said term of ninety-nine years, or at any time within six calendar months after the expiration of the first fifty years of the said term, it shall be lawful for the East India Company to give notice to the said railway company in London and at Bombay of their intention to purchase the said railway and works, together with the telegraphs (if any) and the engines, carriages, stock, plant, and machinery belonging to the said railway and works, and thereupon at the half-yearly day next but one following such notice the land to be provided as aforesaid, with the railway thereon, and all buildings, works, fixed machinery, telegraphs, and conveniences whatsoever, shall revert to and become the property of the East India Company as the owners thereof by purchase on account of the Government of India . . . . and the East India Company shall be bound to pay in London on the said half-yearly day for the purchase of all the said premises the full amount of the value of all the shares or capital stock in the said railway company."

Clause 26 provided: "That in every or any case in which under the provision of these presents the East India Company shall become bound to repay the capital expended by the said railway company as aforesaid, or in which the East India Company shall become liable to pay for the purchase of the said railway works and stock before the expiration of the said term of ninety-nine years, it shall be lawful for the East India Company, instead of paying a gross sum of money in respect of the premises, to declare by notice to the said railway company in London their option to pay an annuity from the time when the gross amount would be payable, and to continue during the residue of the said term of ninety-nine years, and in that case such annuity shall be payable in London on such two half-yearly days in the year as shall be selected by the East India Company in that behalf, with a fractional part for any broken half-year, the rate of interest which shall be used in calculating such an annuity being determined by the average rate of interest during the preceding two years received in London upon public obligations of the East India Company, and which shall be ascertained by reference to the governor or deputy-governor of the Bank of England for the time being."

The railway was duly constructed, and was subsequently extended under the provisions of two further contracts which incorporated the clauses of the contract of August 17, 1849. Under the statute, 21 & 22 Vict. c. 106, all the powers of the East India Company under those contracts became and were vested in the Secretary of State in Council for India for the time being.

On August 18, 1899, the Secretary of State, acting in pursuance of the provisions contained in the 23rd clause of the contract of August 17, 1849, gave notice to the railway company of his intention to purchase the railway, works, &c., constructed under the contracts. The amount to be paid by the Secretary of State to the railway company for the purchase was thereupon ascertained in pursuance of the 23rd clause of the contract of August 17, 1849, and was determined to be the sum of 34,859,217*l.* 17*s.* 6*d.*, which sum under the provisions of that contract became payable by the Secretary of State to the railway company in London on June 30, 1900.

The Secretary of State thereupon by notice to the railway company, given pursuant to the provisions contained in the 26th clause of the contract of August 17, 1849, declared his option, instead of paying the sum of 34,859,217*l.* 17*s.* 6*d.*, to pay an annuity commencing on July 1, 1900, and to continue during the residue of the term of ninety-nine years. The rate of interest to be used in the calculation pursuant to clause 26 was ascertained to be 2*l.* 17*s.* per cent., and the amount to be paid under clause 26 was thereupon ascertained, and was fixed at the annual sum of 1,335,563*l.* 18*s.* 4*d.* (which sum was subsequently reduced by certain adjustments, which were not in dispute, to the annual sum of 1,268,508*l.* 11*s.*), payable half-yearly for the residue of the term of ninety-nine years, with a fractional part for the broken half-year at the end. The method of payment provided by the 26th clause was in substance and in fact the payment of the price of 34,859,217*l.* 17*s.* 6*d.* by means of half-yearly instalments, each of such instalments being composed in part of capital and, as to the residue, of interest on the amount of the price for the time being unpaid.

The Great Indian Peninsula Railway Purchase Act, 1900, provided: (s. 11) that the annuity should be charged on and made payable out of the revenues of India in like manner as other liabilities incurred on account of the Government of India. Sect. 12 provided that the Secretary of State should pay the annuity to the annuity trustees in London at the times and in the manner therein mentioned, the first payment to be made on January 1, 1901, in respect of the six months immediately preceding that payment, and the second on July 1, 1901. The statute further provided that the annuity

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trustees should divide the holders of annuities into two classes, "A" and "B," Class "A" consisting of those annuitants who had elected to receive their annuities in full, and Class "B" consisting of those annuitants who should have elected to receive their annuities, less a sum to be deducted for providing a sinking fund as in the Act prescribed.

On January 1, 1901, a payment of 634,254*l.* 5*s.* 6*d.* became due to the annuity trustees in respect of the annuity. Part of that sum—namely, 162,450*l.* 14*s.* 1*d.*—was in fact a payment on account and as part of the capital sum of 34,859,217*l.* 17*s.* 6*d.* and the residue thereof was a payment in respect of interest on that capital sum for the six months immediately preceding. The Secretary of State for India deducted income tax on the whole of the sum of 634,254*l.* 5*s.* 6*d.* The income tax on 162,450*l.* 14*s.* 1*d.*, which represented a payment of capital, amounted to 8122*l.* 10*s.* 8*d.*

On July 1, 1901, the next half-yearly payment became due, and the Secretary of State for India again deducted income tax upon the whole amount. The income tax on so much of the amount as represented capital was 9611*l.* 6*s.* 6*d.*

The plaintiffs claimed the two sums of 8122*l.* 10*s.* 8*d.* and 9611*l.* 6*s.* 6*d.*, and a declaration "that the half-yearly instalments payable by the Secretary of State are partly a payment by instalments of the price for the purchase of the railways pursuant to the said contracts, and as such are payments on account and as part of capital, and as regards the residue are payments of interest upon the part for the time being unpaid of such price, and that so much of each payment as represents capital is not liable to income tax, and that the plaintiffs are not liable to, and the Secretary of State is not entitled to make, any deduction from future payments in respect of such part of such payments as is a payment on account and as part of the capital sum of 34,859,217*l.* 17*s.* 6*d.*"

Cripps, K.C. (*Danckwerts, K.C.*, and *T. T. Paine* with him), for the plaintiffs. Income tax is not payable on so much of the annuity as represents capital. The capital and interest can be separated by an actuarial calculation, and the plaintiffs do

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not desire to have the question argued whether or not income tax is payable upon the interest. This is not an "annuity" within s. 102 of 5 & 6 Vict. c. 35, and Scheds. C or D of the Income Tax Acts. (1) The tax is a tax on income, not on capital: *London County Council* v. *Attorney-General* (2); see judgments of Lord Macnaghten (3) and of Lord Davey (4); *Gresham Life Assurance Society* v. *Styles.* (5) Nothing depends upon the mere use of the word "annuity"; it has no technical meaning; the real nature of the transaction in each case must be considered in order to ascertain whether what is sought to be taxed is income taxable under the statute. For this purpose there is a distinction between what may be termed "income annuities" and an annual payment of a sum which is partly interest and partly instalments of capital. Where capital is converted into income for the very purpose of being expended annually, it is an income annuity and is taxable. Instances of this class of annuity are income derived from Consols, life annuities, annuities for terms of years, and perpetual annuities. But an annual payment of sums as instalments of purchase-money, or of a debt due to the person to whom the payment is made, being instalments of capital on capital account, are not taxable as income. *Foley* v. *Fletcher* (6) is a direct authority in favour of the plaintiff. The plaintiff sold mines, part of the purchase-money being paid at once, and the residue, with interest, was to be paid by equal half-yearly instalments extending over thirty years. It was held that the instalments were not chargeable with income tax under Sched. D. So, in *Leeds Benefit Building Society* v. *Mallandaine* (7), where a building society lent money to members at a fixed rate of interest, taking from them a security on their property, and the repayment of the loans was by weekly payments of a fixed sum in respect of principal and interest, the proportion of interest to principal in each payment decreasing as the time went on and the principal remaining due decreased, it was held that income tax was payable on the interest received by the society, but the Crown did not contend that the tax was payable on the instalments of the principal. *H.R.H. The Nizam State Ry. Co.* v. *Wyatt* (1) is distinguishable from the present case. Here, under clause 23 of the contract, it is clear that income tax could not have been claimed in respect of the capital sum of 34,859,217*l.* It could only have been payable in respect of interest on that sum, or derived from that sum invested in other securities. Unless the word "annuity" in the schedules of the Act is to be taken as having some technical meaning, clause 26 of the contract cannot have the effect of causing income tax to be payable upon that principal sum when it is paid in instalments instead of as a lump sum. The true nature of the transaction is, not that an income is purchased with capital, the capital having gone and ceased to exist, but that there is a series of annual payments of instalments of capital, to which is added interest on capital from time to time unpaid. It is not a case in which the capital is got rid of in order to have an annual income, but it is a case in which the capital is preserved, and intended to be preserved, until it has been repaid by a series of annual instalments. Here the railway company had no option, but, under the provisions of the statute, were compelled to take the repayment of their capital in this way. For the purposes of this argument it is not desired to draw any distinction between the "A" and "B" classes of annuitants.

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(1) By 5 & 6 Vict. c. 35, s. 102, and Sched. D, income tax is to be payable "upon all annuities, yearly interest of money, or other annual payments" payable as therein provided.

By Sched. C of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), income tax is payable "for and in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue, and to be charged for every twenty shillings of the annual amount thereof."

(2) [1901] A. C. 26.

(3) [1901] A. C. at pp. 35, 36.

(4) [1901] A. C. at p. 45.

(5) [1892] A. C. 309.

(6) 3 H. & N. 769; 28 L. J. (Ex.) 100.

(7) [1897] 2 Q. B. 402.

Sir Robert Finlay, A.-G. (*S. A. T. Rowlatt* with him), for the defendant. Income tax is payable, under Sched. C, upon the annuity. *Foley* v. *Fletcher* (2) was decided on demurrer, and the Court were bound to accept the facts stated in the pleadings. According to those facts, they had to treat the debt as continuing to exist and payable in instalments, and to decide

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(1) (1890) 24 Q. B. D. 548.

(2) 3 H. & N. 769; 28 L. J. (Ex.) 100.

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whether or not income tax was payable on those instalments. If they had been at liberty to consider the true nature of the transaction, it is probable that the decision would have been different. Watson B. said (1): "The 102nd section of the 5 & 6 Vict. c. 35 is relied on by the defendants, and this payment is said to fall within the description of an annuity. But an annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity. Annuities are made chargeable by express words." His definition of "annuity" exactly describes the transaction here. The capital has gone and has ceased to exist; the principal has been converted into an annuity. *Foley* v. *Fletcher* (2) really supports the case for the defendant. The plaintiffs cannot rely on the fact that they were compelled to take an annuity instead of a lump sum down, because the compulsion arises out of the contract they themselves made with the East India Company. Clause 26 of the contract makes it clear that the annuity is substituted for the "gross sum payable in respect of the premises." There are no such things as "income annuities" as distinct from other annuities. All annuities are income for the purposes of the income tax. The essence of every annuity is that the price of the annuity—the principal sum—is gone, and for it has been substituted an annual payment. The same considerations apply where a man buys an annuity for his life, or leaseholds for a short term, or mines, or quarries. It makes no difference that what he buys is a wasting security. When once the annuity is created it is income just as much as if it were money derived from the profits of a business, and it makes no difference that a sinking fund is created for the purpose of replacing capital: *Coltness Iron Co.* v. *Black.* (3) In the present case the "A" and "B" annuities stand on exactly the same footing so far as concerns the liability to income tax. The purpose for which a man converts his capital into an annuity is quite immaterial. The decision in *Leeds Benefit Building Society* v. *Mallandaine* (4) has no application to the facts here. There was a debt due from the members of the society, who were to repay that debt, and interest, by instalments of so much a week. It was a simple matter of calculation how much of the weekly sum was in respect of interest and how much in respect of the repayment of the sums advanced.

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(1) 3 H. & N. at pp. 784, 785.

(2) 3 H. & N. 769; 28 L. J. (Ex.) 100.

(3) (1881) 6 App. Cas. 315.

(4) [1897] 2 Q. B. 402.

Cripps, K.C., replied.

PHILLIMORE J. The plaintiffs in this case seek to recover from the Secretary of State for India two large sums of money which he has deducted from a payment, called an annuity, which he has to make half-yearly to the plaintiffs as trustees for the former shareholders of the Great Indian Peninsula Railway Company. That company was formed in 1849, and it received a guarantee of financial assistance from the East India Company upon the term contained in clause 23 of the agreement between it and the East India Company, that after fifty years the East India Company might buy the whole interest of the railway company. A further clause (26) provided that the East India Company, if it became liable to pay for the purchase of the railway, might, instead of paying a gross sum of money, declare by notice its option to pay an annuity to be reckoned from the time when the gross amount would be payable, and to continue for the residue of the term of ninety-nine years for which the land on which the railway was constructed was granted by the East India Company to the railway company, interest being calculated for that purpose at a rate to be ascertained by the governor, or deputy governor, of the Bank of England for the time being. The fifty years having elapsed in 1899, the Secretary of State for India, who has succeeded the East India Company, gave notice to purchase, and then gave notice that he would pay an annuity as provided by the contract. The rate of interest was ascertained from the Bank of England at 2*l*. 17*s*. per cent. Thereupon, the gross sum arrived at being about 34,859,217*l*., the annuity was ascertained to be 1,268,508*l*., payable half-yearly. The Secretary of State has paid that annuity, but he has deducted from the half-yearly payments income tax in respect of it. I ought, perhaps, to add that, under the Act of Parliament carrying out the Secretary of State's notice, an arrangement is made that the annuity to be paid to the Great Indian Peninsula Railway Company should be paid to certain annuity trustees, who are to establish two classes of annuitants—Class A, who will have their annuity in full, and will have nothing when it comes to an end; and Class B, who will suffer a deduction in respect of a sinking fund, and will have their share of that sinking fund when the annuity comes to an end. The question I have to determine is whether the Secretary of State has rightly deducted income tax on his half-yearly payments to the annuitants' trustees. Now, by s. 102 of 5 & 6 Vict. c. 35, and under Sched. D of the Income Tax Acts, "upon all annuities, yearly interest of money, or other annual payments" payable as therein provided, income tax shall be paid at the same rate as upon other annual profits or returns; and by Sched. C to the Income Tax Act, 1853 (16 & 17 Vict. c. 34), income tax is payable "for and in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable to any person, body politic or corporate, company, or society, whether corporate or not corporate, out of any public revenue." The plaintiffs rather treated the claim of the Secretary of State for India on behalf of the Crown as coming, if at all, under Sched. D; the counsel for the Crown preferred to put it under Sched. C, and I think the counsel for the Crown are right. Is this such an annuity as is struck at and taxed by Sched. C? It is called an "annuity"; but that, I agree with counsel for the plaintiffs, does not by any means settle the matter; one has to ascertain what the transaction really is. Now, there is an excellent definition of an "annuity" given by Watson B. in the case of *Foley* v. *Fletcher* (1): "An annuity means where an income is purchased with a sum of money, and the capital has gone and ceased to exist, the principal having been converted into an annuity." Now, is not this such an annuity? An annuity may be perpetual, such as bank annuities; it may be for a long period of time, such as the old long annuities.

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(1) 3 H. & N. 769; 28 L. J. (Ex.) 100.

There is an equivalent to an annuity terminable at some period of years or other in the tenure of a leasehold interest in land; and there are annuities, with which one is perhaps more often familiar, depending upon the life of an annuitant; but in all those cases the person who procures the annuity, if he procures it for money or money's worth, purchases it, and for that purpose parts with his capital, which ceases to exist. He never sees it again; he gets instead an annuity, which, except in the case of a perpetual annuity, gives him a larger income than he would have had if he had put his capital out at interest. In my opinion that is exactly what has happened in this case, except that the railway company has been compelled to it—that is to say, that if the Secretary of State for India had not exercised his contractual powers and given it notice, it would have had a lump sum of money to distribute among its shareholders. But the company gave the Secretary of State for India that power by the contract into which it entered, and, going back to the root of the matter, in the events which have happened, the railway company has contracted to allow its property to be purchased for an annuity. One way of arriving at a conclusion whether this is an annuity or whether it is, as has been suggested, a payment of purchase-money by instalments, is, I think, to see whether the periodical payments are equal. It could, of course, be otherwise arranged, but still in an ordinary and simple course of payment by instalments of principal with interest the first payment would be larger than the second, and the second larger than the third, and so forth, because the payments of principal would be equal, and the amount of interest would diminish as the payments went on. I do not say that that is by any means a certain guide, but it gives one some indication when one looks to see whether this is a case of an annuity or a mere payment of purchase-money by instalments with interest. No doubt in one sense the tax upon an annuity, if it be equally high with the tax upon income from investment, is a tax to that extent upon capital, or an equivalent of capital, and not merely upon income; and it is rightly said that the Income Tax Acts intend to tax income. But it is also right to say that they intend to tax as

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income any returns which come from a wasting security—such as returns from leaseholds, or from quarries and mines; and there is, therefore, nothing anomalous in the taxation of annuities, although they are partly repayments of capital, upon the same scale as the taxation of interest proper. It is, to my mind, clear that it was intended by the statutes to tax such annuities, and in this case the annuity seems to me to be plainly an annuity for which the railway company has sold its property. The difficulty—and it is a considerable difficulty until the case is carefully studied and considered—arises from the decision in *Foley* v. *Fletcher*. (1) It does not, I think, arise from the language of the judges—certainly not from the language of Watson B., which I have quoted—but from the decision itself. It is sought to build upon that decision a distinction between annuities which are called "income annuities" and annuities which are in reality repayments of principal with interest. The answer is that all annuities are income; all annuities are repayments of principal with interest. In the case of annuities for terms certain this can be accurately ascertained. In the case of an annuity for life, the only difference is that an actuarial calculation has to be made as to the value of the annuitant's life or the value of lives of ordinary annuitants of the same age. All annuities are repayments of principal. It is sought to say here that you must look at the arrangement in this way: If the Secretary of State had paid the 34,000,000*l.* odd to the railway company down, and had then said immediately afterwards, "Now, I should like you to give me that back again and to take instead an annuity," that might be a taxable annuity; but, inasmuch as that process was not actually gone through here, though mentally it has been gone through, this is not the grant of an annuity, but the payment of purchase-money by instalments. I think the whole of that idea comes from building upon the case of *Foley* v. *Fletcher* (1) without looking very deeply into the pleadings in that case. I was struck by the argument at first; but I think the answer is that *Foley* v. *Fletcher* (1) decided exactly what it did decide upon the pleadings in the case, and could not have

(1) 3 H. & N. 769; 28 L. J. (Ex.) 100.

decided otherwise upon those pleadings. In *Foley* v. *Fletcher* (1), by an indenture of 1854, a conveyance of lands, buildings, and mines was made for a sum of 99,000*l*., of which 6770*l*. was paid down, and the balance of 92,230*l*. was divided into two halves (because there were two grantors), which were to be paid by equal instalments half-yearly. Now, those instalments apparently work out as exact aliquot portions of the stipulated unpaid purchase-money, and it is remarkable that there was an express provision that, if any instalment was not paid, it should bear interest. As those instalments went on for a great number of years, it is obvious that either the purchase-money was largely increased by capitalisation of the interest, or the vendors lost a great sum of money; and, of course, the truth is that they did not lose that great sum of money; that they stipulated for 99,000*l*., not because the property was worth 99,000*l*. to sell then, because it was worth probably not much more than 50,000*l*., but because, if the various instalments were to be put off for that long period of time, and interest charged thereon, it would be necessary to capitalise the interest and to give a present value to it: to add it to the principal and so arrive at the sum of 99,000*l*. It follows that the half-yearly instalments were exactly that which the Court said they were: they were simply instalments of purchase-money, not instalments of purchase-money with interest, which is what the annual payments are in the present case, but instalments of purchase-money—nothing more and nothing less; and I cannot help suspecting that the arrangement was made in that way either owing to there still existing at that time some remnant of the usury laws, or from fear of there being a difficulty in the way of the vendor in enforcing interest upon interest. Taking the facts stated on the pleadings to be the true facts, the averment being that the price at which the land was sold was 99,000*l*., and that 92,230*l*. remained unpaid to be paid by instalments which exactly work that sum out without interest, the Court could not do otherwise, upon demurrer, than say that each of those periodical payments was a mere periodical payment of a portion of the purchase-money. It differed

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(1) 3 H. & N. 769; 28 L. J. (Ex.) 100.

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from an annuity. An annuity, as I understand it, is a contract for a periodical payment for a proportion of the purchase-money, with interest so ordered that each payment equal; though the interest each half-year would otherwise decrease. That seems to me to be the distinction between an annuity and the particular contract, as expressed in the deeds and in the pleadings in *Foley* v. *Fletcher*. (1) I think, therefore, that the decision in that case does not stand in my way, while the reasoning of the decision helps me to the conclusion that this is nothing more nor less than an annuity. Though I see that there is a certain amount of hardship to the annuitants in their being compelled to take their money in a form in which they will pay larger income tax, the only answer is that they, or their predecessors in title, made a contract in 1849 under which this has become possible, and the parties have to stand on their rights. There must be judgment, therefore, for the defendant.

Judgment for the defendant.

Solicitors for plaintiffs: *White, Borrett & Co.*
Solicitor for defendant: *Solicitor of Inland Revenue.*

W. A.

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(1) 3 H. & N. 769; 28 L. J. (Ex.) 100.

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June 19, 25.

Chose in Action—Assignment—Contract to sell Reversionary Interest—Assignment by Purchaser of Benefit of Contract—Right of Assignee to sue Vendor for Breach — "Legal Chose in Action" — Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The defendant contracted to sell his reversionary interest in property to R., who by deed assigned his interest under the contract to the plaintiff, and notice in writing of the assignment was duly given to the defendant. The defendant after the assignment to the plaintiff refused to perform his contract:—

Held, that the assignment was an assignment of a "legal chose in action" within s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiff was entitled to sue the defendant for damages for the breach of contract.

Appeal from the Mayor's Court.

The following statement of the facts proved at the trial, and the decision of the Common Serjeant, is taken from the judgment of Channell J.

This was an appeal from the Mayor's Court in an action brought by the plaintiff, claiming to sue as assignee by virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66), for damages for an alleged breach of a contract by the defendant to sell to one Rayner a reversionary interest. The contract should have been completed on May 8, 1901. It was not completed on that date, but it is agreed that time was not of the essence of the contract, and the parties continued to negotiate on the footing that the contract was still in force. On June 10, whilst matters were still in this condition, Rayner by deed assigned his interest in the contract to the plaintiff, and notice in writing of the assignment was given to his vendor, the defendant. Negotiations proceeded for a time, but afterwards the plaintiff alleged that the defendant had broken the contract, and brought this action for damages. At the trial the Common Serjeant held that the plaintiff was not entitled to sue under the Judicature Act, because the contract was not a "legal chose in action" within the meaning of the section relied on

(s. 25); but he found that there had been a breach by the defendant, and that the damages, if the plaintiff was entitled to recover, would be 100*l*.

The plaintiff appealed from that decision.

Stewart-Smith, K.C. (*Sydney Clarke* with him), for the plaintiff. The assignment by Rayner of his interest in the contract to the plaintiff was an assignment of a "debt or other legal chose in action" within s. 25, sub-s. 6, of the Judicature Act, 1873, and the plaintiff is, therefore, entitled to sue the defendant for damages for breach of the contract. The term "legal chose in action" includes all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful. The Colonial judges took that view in *King* v. *Victoria Insurance Co.* (1), and Lord Hobhouse in delivering the judgment of the Privy Council did not dissent from it: see also *Manchester Brewery Co.* v. *Coombs.* (2) A Court of Equity would before the Judicature Act have recognised the right of either party to specific performance of this contract to buy a reversion; the purchaser had an equitable interest in the contract, which he could assign, and his assignee would have been entitled in a Court of Equity to all the rights and remedies of his assignor against the vendor. Things which have been held to be "things in action" are enumerated in the argument in *Colonial Bank* v. *Whinney.* (3) They include policies of life insurance and shares in companies; and, if those are "legal choses in action," it is difficult to see why a right to the benefit of a contract to sell a reversion is not. Whether or not this was a "legal chose in action" before the Judicature Act, it is covered by the terms of the statute. [He also referred to *Price* v. *Seaman.* (4)]

M. M. Macnaghten, for the defendant. It may be admitted that a right to recover damages for breach of a contract is a chose in action, but the expression "debt or other legal chose

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(1) [1896] A. C. 250.

(2) [1901] 2 Ch. 608; Farwell J. at p. 619.

(3) (1886) 11 App. Cas. 426, at pp. 429, 430.

(4) (1825) 4 B. & C. 525.

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in action" in s. 25, sub-s. 6, of the Judicature Act, 1873, does not cover it. Sub-s. 6 does not cover all things which are things in action—e.g., it does not cover shares in a company, because they can only be transferred under the Companies Acts. The words "debt or other legal chose in action," mean "debt or other liquidated money claim arising under a contract"; they do not include a right to claim unliquidated damages: *May* v. *Lane* (1), judgment of Lord Esher M.R. (2) and of Rigby L.J. (3) The dicta of the Colonial judges in *King* v. *Victoria Insurance Co.* (4) went too far, and the dictum, too, of Farwell J. in *Manchester Brewery Co.* v. *Coombs* (5) was not necessary for the decision of the case, and was given without the point having been argued before him. Further, this was not a right which could have been assigned before the Judicature Acts. The defendant could not have sued the plaintiff in respect of it, nor could Rayner in the defendant's name. A bare right to sue was not assignable, nor would the Court of Equity ever enforce it: *Prosser* v. *Edmonds*. (6)

Stewart-Smith, K.C., in reply. In *May* v. *Lane* (1) there was a mere promise to lend money; it could not be enforced by a decree for specific performance, nor could an action be brought on it. The dictum of Lord Esher M.R. was unnecessary for the decision of the case. [He also referred to *Hall* v. *Laver*. (7)]

Cur. adv. vult.

June 25. The judgment of the Court (Lord Alverstone C.J., Darling and Channell JJ.) was read by

CHANNELL J., who, after stating the facts as previously set forth, proceeded:—We have, therefore, to consider the meaning of the expression "other legal chose in action" in sub-s. 6 of s. 25 of the Judicature Act, 1873. In order to arrive at this meaning, I think it necessary to consider what is the object of the Act, and of the particular section of the Act in which the words are to be found. The Act provided for the amalgamation of the then existing superior Courts of Law and Equity with a view to the administration in the new Court of one system of law in place of the two systems previously known as Law and Equity, and the general scope of the Act was to enable a suitor to obtain by one proceeding in one Court the same ultimate result as he would previously have obtained either by having selected the right Court, as to which there frequently was a difficulty, or after having been to two Courts in succession, which in some cases he had to do under the old system. The 25th section provided what was to be the rule in future in cases where previously the two systems differed. This is seen not only by looking at the particular matters provided for by the first ten sub-sections, but by the words of sub-s. 11: "Generally in all matters not hereinbefore particularly mentioned in which there is a conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." This seems to me to shew that sub-s. 6 is one of the matters particularly mentioned in which the rules of equity and common law had conflicted or varied in reference to the same matter, and this gives the clue to the meaning of any doubtful expression. "Chose in action" is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is an expression large enough to include rights which it can hardly have been intended should be assignable by virtue of the sub-section in question, as, for instance, shares, which can only be transferred as provided by the Companies Acts. It is probably necessary, therefore, to put some limit upon the generality of the words; but I think that the necessary limitation is shewn by the considerations to which I have already referred, and also by the words of sub-s. 6 itself. I think the words "debt or other legal chose in action" mean "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with

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(1) (1894) 64 L. J. (Q.B.) 236.

(2) 64 L. J. (Q.B.) at p. 237.

(3) 64 L. J. (Q.B.) at p. 238.

(4) [1896] A. C. 250.

(5) [1901] 2 Ch. 608.

(6) (1835) 1 Y. & C. 481; Lord Abinger C.B. at p. 497; 41 R. R. 352.

(7) (1838) 3 Y. & C. 191.

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as being assignable." That is the point of difference or variance between the rules of equity and common law which it is intended to deal with by this sub-section. Further, by the words of the sub-section itself the assignment is to be effectual in law, subject to all the equities which would have been entitled to priority over the rights of the assignee if this Act had not been passed. This seems to mean that the cases dealt with are cases where the assignee had some right before the Act—that is to say, where the right of the assignee had previously been recognised by a Court of Equity. That the assignment is still to be subject to equities again seems to indicate that the rule of the Court of Equity is substantially being adopted; but it is to be remembered that in cases within these first ten sub-sections there is not necessarily a simple adoption of the rules of equity as in cases under sub-s. 11. New rules are, at least in several cases, laid down for the new Court which, whilst based mainly on the rules of equity, yet nevertheless are not a simple repetition of equity rules. For instance, the provisions of these sub-sections as to interpleader and as to the Trustee Act appear to be new, and I think also the provisions that both the assignment and the notice of it must be in writing were with respect to matters not held necessary in equity. Now, the question we have to consider in the present case is whether an executory contract of purchase under which each party has rights and responsibilities, but of which there had been no breach at the date of the assignment, so that at that date no action could be brought upon the contract, but which, if occasion should ever arise to enforce it, must of necessity be enforced by action, is assignable by this sub-section as a "legal chose in action." That it is a legal chose in action, and was so at the date of the assignment, cannot be denied; but the question is whether it is so within the meaning of the words as used in the sub-section. I think it is, because it is a case in which the assignee would, at any rate after giving notice of the assignment, have had rights if the Act had not been passed. The Court of Equity would undoubtedly have recognised his right, and would have treated the assignor as being trustee for his assignee, and they would have given to the assignee all the rights and remedies as against his assignor which they gave to a cestui que trust against his trustee, and would have given to him as against the other party to the contract all the rights and remedies which they gave to a cestui que trust against a third person dealing with his trustee in reference to the subject of the trust after notice of the trust. I believe it to be clear that in such a case as the present, if the assignor Rayner refused to sue the defendant for damages for the benefit of the present plaintiff, the assignee, the plaintiff could have taken proceedings in a Court of Equity, and have got a decree that he should be at liberty, on giving a proper indemnity, to use the assignor's name for the purpose of suing the present defendant. Thus by going to two Courts the plaintiff would have got his damages from the defendant, assuming, of course, that there had been a breach of contract by the defendant. It is true that the present plaintiff could not in the Court of Equity get damages from the defendant; but that is because the Court did not, except in cases under Lord Cairns' Act, entertain a claim for damages at all, whether by the party to the contract or his assignee, and not because of the plaintiff being assignee. It is suggested that there is a difficulty in holding that such a contract as the present can be assigned by virtue of this sub-section, because the contract cannot be transferred in its entirety—that is to say, only the benefit of it, and not the liability under it, can be transferred. But this is just what the sub-section deals with. It says that the assignment shall be sufficient to transfer the legal right to such debt or chose in action, and any difficulty as to the liability of the assignor is met by the clause as to the assignment being subject to equities. The assignee only takes subject to any claim under the contract which would have been good against his assignor. Further, of course he can only recover damages if he can shew a breach by the defendant, and the question whether there had, or had not, been a breach might in many cases depend upon dealings between the original contracting parties. In my opinion, upon the facts of the present case, assuming the breach which has been found by the Common Serjeant, the plaintiff might, before the Judicature

Act, by going first to the Court of Equity and then going, in the name of the assignor, to the Court of Common Law, have got his damages; and I think, under these circumstances, the sub-section applies, and the plaintiff may now go to the High Court of Justice (or to the Mayor's Court, which has the same combined legal and equitable jurisdiction) direct for his damages. I find nothing in the cases on the subject contrary to this view. It was the view of the Colonial judges who decided the case which came before the Privy Council in *King* v. *Victoria Insurance Co.* (1) The Privy Council did not dissent from their view. They simply decided the case on a different ground, and "preferred to express no opinion what limitation (*if any*) should be placed on the literal meaning of the term 'legal chose in action.'" That question, they say, is not free from difficulty; but it may be that they rather felt the difficulty of putting any limitation at all upon the literal meaning than a difficulty in limiting it to at least the same extent as the Colonial judges had done. Farwell J. clearly expressed the same view in *Manchester Brewery Co.* v. *Coombs* (2); but it seems that he, without much examination of the report, thought that it had been so held by the Privy Council. *May* v. *Lane* (3) appears to contain a dictum of Lord Esher that a claim for damages could not be assigned under this sub-section. This was not necessary to the decision, and it is not quite clear from the report until the facts are carefully examined what it was that Lord Esher thought to be the objection to such an assignment. Rigby L.J., however, adds: "A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action" (by that I think he means a *mere* right of action) "such as, for instance, a right to recover damages for breach of contract, or a legal right to recover damages arising out of an assault; for if the argument on behalf of the plaintiff be correct, such a right would be assignable, and this section of the Judicature Act would materially affect the law of champerty and maintenance." When the facts of that case are looked at, it will be seen to be quite clear that the contract, by breach of which the alleged damages had accrued, had never been assigned at all. The document was in the form: "We authorize you to pay 50*l.* out of the moneys due or to become due to us on the buildings we are erecting." If there had been any debt, this might have been a good assignment of 50*l.* out of it, although *Brice* v. *Bannister* (1), which so holds, has been somewhat doubted in *Durham Brothers* v. *Robertson* (2) and *Jones* v. *Humphreys.* (3) There was, however, no debt, but at most a claim for damages (probably nominal only) for not advancing money pursuant to contract. It could not possibly be said that this document was an assignment of the contract; at most it was an assignment of damages in respect of a particular breach. I think Rigby L.J. did not mean that an assignee of a contract could never sue for damages for breach of it, but merely that when a breach of contract had occurred in respect of which the original party to the contract could sue for damages, he could not assign those damages so as to enable the assignee to sue. I have no doubt that the practice of the Court of Equity prior to the Judicature Act was to refuse to give effect to an assignment of a mere right to litigate. Those Courts were bound by the law as to champerty and maintenance as well as the Courts of Common Law. It is not, however, necessary for us to deal exhaustively with the question of what contracts a Court of Equity would have held to be assignable. Here the contract is one to purchase a reversion. It is a class of contract in which the Court of Equity recognised the right of each party, vendor as well as purchaser, to specific performance, and where the purchaser was entitled to specific performance he was recognised as having an equitable interest in the property. In that state of things he could assign the contract and his equitable interest thereunder without any objection arising from the law as to champerty. The fact that something subsequently happened which prevented his getting specific performance, or the fact that he elected to claim damages,

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(1) [1896] A. C. 250.

(2) [1901] 2 Ch. 608, at p. 619.

(3) 64 L. J. (Q.B.) 236.

(1) (1878) 3 Q. B. D. 569.
(2) [1898] 1 Q. B. 765; Chitty L.J. at p. 774.
(3) [1902] 1 K. B. 10.

would not take away the right which had vested in him, on notice of the assignment, to all the legal and other remedies for the chose in action. The decision of Chitty J. in *Western Wagon and Property Co.* v. *West* (1) is, I think, in accordance with this view. I may mention, not as an authority, but in explanation of the view I take, that I myself in *Marchant* v. *Morton, Down & Co.* (2) have held that this sub-section is merely machinery; that it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the assignor's name, but only where he could so sue. I think that in the present case, where there was a contract of sale which gave the purchaser an equitable interest in the property contracted to be sold, the assignment and notice gave the assignee a legal right to sue, not only for specific performance if he had a case for it, but also for damages if he either was driven or elected to take that remedy. I think, therefore, that the appeal should be allowed, and judgment be entered for the plaintiff for 100*l*. The Chief Justice and Mr. Justice Darling concur in this judgment.

Appeal allowed.

Solicitor for plaintiff: *J. W. Browne.*
Solicitor for defendant: *G. J. Fowler.*

(1) [1892] 1 Ch. 271.

(2) [1901] 2 K. B. 829, at p. 832.

W. A.

1902
June 23, 24.

THE KING *v.* HIS HONOUR JUDGE OWEN AND ROBERTSON.

Employer and Workman—Workmen's Compensation Act, 1897—*Injury by Accident in England—Employer resident in Scotland—Jurisdiction of County Court where Accident occurred—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), 2*nd Schedule, clause* 9—*Workmen's Compensation Rules, r.* 15.

When a workman resident in England is injured by an accident occurring in England but his employer resides in Scotland, proceedings for compensation under the Workmen's Compensation Act, 1897, may be taken in the county court of the district in which the accident occurred, and service of the necessary notices may be effected by registered post.

Rule nisi for an order to hear and determine an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman who was injured by accident arising out of and in the course of his employment by the respondent Robertson, on a wharf, which was situate within the district of the Newport (Monmouth) County Court. The respondent was a domiciled Scotsman residing and carrying on business at Glasgow, and the applicant resided in England. Proceedings for compensation under the Workmen's Compensation Act, 1897, were taken in the Newport County Court. The county court judge decided that he had no jurisdiction, inasmuch as the respondent resided in Scotland, and dismissed the application. (1)

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(1) The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), 2nd schedule:—

Clause 9: "Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of Court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or, if they reside in different districts, the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of Court."

Clause 14: "In the application of this schedule to Scotland—(*a*) 'Sheriff'

This rule was then obtained calling upon the county court judge and the respondent to shew cause why the judge should not hear and determine the application.

Lush, K.C., and *Bailhache*, shewed cause for the respondent Robertson. An application for an order to hear and determine is not the proper remedy in this case. The county court judge did not decline jurisdiction, in the ordinary sense, but after full argument decided that the proceedings could not be brought in this county court. The only remedy of the plaintiff is by appeal to the Court of Appeal.

Bankes, K.C., and *A. Parsons*, for the applicant. The county court judge did refuse jurisdiction; he declined to hear the case upon the ground that proceedings would not lie in the county court against a Scotsman because he did not reside within a "district" within the meaning of clause 9 of the 2nd schedule to the Act. The proper remedy, therefore, is by an application to this Court for an order to hear and determine the matter, under s. 131 of the County Courts Act, 1888: *Reg.* v. *Southampton County Court* (1); *Welland* v. *Great Western Ry. Co.* (2)

The Court intimated that they would hear the case on the merits.

Lush, K.C., and *Bailhache*, for the respondent. The county court had no jurisdiction to entertain these proceedings. There is no machinery by which proceedings in the county court can be initiated or carried on against a Scotsman. There are no provisions as to service out of the jurisdiction, for which express provisions are necessary. The words of clause 9 of the 2nd schedule, "if they reside in different districts," are not applicable to a Scotsman or to any foreigner. There is nothing in the Act which gives a county court any jurisdiction

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shall be substituted for 'county court judge,' 'sheriff court' for 'county court,' 'action' for 'plaint,' 'sheriff clerk' for 'registrar of the county court,' and 'act of sederunt' for 'rules of Court.'"

(1) (1891) 65 L. T. 320.

(2) (1900) 16 Times L. R. 297.

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over a foreigner, and for this purpose a Scotsman or an Irishman is a foreigner. A case of this kind is entirely unprovided for, and is a casus omissus.

[They referred to *The City of Agra.* (1)]

Bonsey, for the county court judge.

Bankes, K.C., and *A. Parsons*, for the applicant. This Act applies to Scotland, and makes all employers liable to pay compensation in cases to which the Act applies. It is quite unnecessary, therefore, to consider the case of a foreigner. In a case of this kind service is a mere matter of procedure, for service is not necessary to found the jurisdiction, which is given by the Act itself: *In re Busfield* (2); *In re King & Co.'s Trade-mark.* (3)

The provisions of clause 9 of the 2nd schedule are applicable. The expression "district" need not be read in any technical sense as applicable only to the district of a county court; it can properly be read as meaning the area over which a county court or sheriff court has jurisdiction. The proper construction of that clause is that, if the parties do not reside within the jurisdiction of the same Court, the Court having jurisdiction is that within the jurisdiction of which the accident occurred, whether in Scotland or in England. There is no difficulty as to service; s. 2, sub-s. 4, provides that the notice of accident may be served by post by registered letter, and rule 15 (2) of the Rules under the Act provides that service of notices and copies may be effected by post as provided by s. 2. If the decision of the county court judge is upheld, the workman will have no remedy in respect of the clear right to compensation given to him by the Act.

LORD ALVERSTONE C.J. This is one of that class of cases in which one does not and cannot expect to find every particular case expressly dealt with in the statute. We have to decide, looking at the whole scope of the Act and at certain expressions therein, what was the intention of the Legislature in words which seem to me to be capable of two meanings.

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(1) [1898] P. 198.

(2) (1886) 32 Ch. D. 123.

(3) [1892] 2 Ch. 462.

The facts of this case may be briefly stated. An accident happened to a workman at Newport, Monmouth. The employer was a Scotsman resident in Scotland. It is contended, therefore, that no county court judge has any jurisdiction to entertain proceedings for compensation under the Act. Now, when we are dealing with different parts of the United Kingdom in which there are separate systems of law, if the general scope of the Act shews that it is intended to apply to the whole of the kingdom, we must be satisfied that the Act of Parliament does not apply in the particular case. This Act was intended to apply to all parts of the United Kingdom, and the employers within the whole area were intended to be made liable under its provisions, and, if a Scottish employer were held to be outside of its provisions, that would clearly be a casus omissus. The main argument on behalf of the workman is that a general direction is to be found in the Act that employers are to be liable in certain events to their workmen, and that workmen are to have certain rights against their employers, and that, unless it appears that the words are so limited that a Scottish employer is outside of the Act if the accident happens in England, we ought, if possible, to give full effect to the Act by holding that he is liable. The Act being intended to apply to Scotland, it was thought necessary to make certain consequential provisions as to the language of the statute in order to make the machinery apply to Scotland. In the Act itself the only provision of that kind is in s. 7, sub-s. 2 (*b*), in the definition of "dependants." It seems to me very important to find that it was not thought necessary to make any other special provision in the Act itself with regard to Scotland. Then, in the 1st schedule, which contains the "scale and conditions of compensation," clause 16 contains provisions for the purpose of making that schedule applicable to jurisdiction in Scotland; and, in the 2nd schedule, containing the provisions for arbitration, clauses 14 and 15 shew that those provisions are, with the exceptions mentioned in the latter clause, applicable in Scotland. Now, those provisions clearly shewing, in my opinion, that the Act was intended to apply as a whole to Scotland, we come to the particular provision which gives

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rise to the difficulty in this case, and that is clause 9 of the 2nd schedule. Reading that clause as altered when applied to Scotland, it will run thus: "Where any matter under this Act is to be done in a county court, or sheriff court, or by, to, or before the judge or registrar of a county court, or the sheriff or sheriff clerk, then, unless the contrary intention appear, the same shall, subject to rules of Court, be done in or by, to or before the judge or registrar of the county court or sheriff court of the district in which all the parties concerned reside, or, if they reside in different districts, the district in which the accident out of which the said matter arose occurred." Now, if clause 9 had read, "if they do not all reside in one district, the district in which the accident occurred," I think that the matter would not have been so difficult. The difficulty really arises from the words, "if they reside in different districts." Looking at the provisions and scope of this Act, I think that it would be wrong to say that a different intention was disclosed by the use of that particular form of words referring to the jurisdiction of a particular Court. I think that the real substantial effect of that clause is that, if the persons concerned are not all subject to the jurisdiction of one Court contemplated by the Act, then the jurisdiction is to be where the accident occurred. The only other point is whether the word "district" must be limited to a county court district. If that had been the intention, I think that there would have been a definition of "district" with reference to Scotland and Ireland. The framers of the Act probably thought that when the Courts in Scotland had been substituted for the county courts it was not necessary to define the expression "district." Therefore, I think that for the purposes of this case we find two Courts contemplated by the Act, the Court for the place where the plaintiff resides and the Court for the place where the defendant resides, the one an English Court and the other a Scottish Court; and I think that the parties did "reside in different districts" within the meaning of clause 9 of the 2nd schedule. It would be too narrow a construction to hold that the whole jurisdiction under the Act is defeated upon the ground that "district" in clause 9 is confined to a county court district in

England and does not include a sheriff court in Scotland. I think that we can rightly construe "district" as meaning the district of any Court which has jurisdiction under the Act. During the argument we were pressed with the difficulties which might arise in the case of a foreign employer when the accident happened within the district of a county court, or in the case of an employer who was a British subject but resident out of the United Kingdom. It is not, however, necessary to say anything upon those questions. I am clearly of opinion that, where the parties are resident in different districts in the United Kingdom, the Court within the district of which the accident happened has jurisdiction, and that the procedure as to service of proceedings being effected by registered letter is applicable to the whole area which is within the ambit of the Act. For these reasons I think that this rule must be made absolute.

Darling J. I am of the same opinion. The difficulty arises from the use of the words "if they reside in different districts" in clause 9 of the 2nd schedule, and in the application of those words to a case where one party does reside in the district of an English county court and the other party does not so reside, but does reside within the area, whatever it may be called, of a sheriff court in Scotland. The question, therefore, is whether the word "district" means merely the district of a county court. We decide that it does not here mean merely the district of a county court, but that it includes the area over which a sheriff court has jurisdiction. We do not decide that the word "district" is used with regard to one of the parties as meaning a county court district, and with regard to the other party, who does not reside in a county court district, as meaning the area, whatever it may be, in which he does reside, in whatever country it may be. Our decision, as I understand it, is limited to saying that "district" means the county court district in which one of the parties resides, and the district in which the other party resides in Scotland or Ireland equivalent to a county court district in this country. We do not say that "district" means the area in which a

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foreigner may reside in a foreign country, and do not express any opinion upon that question.

Channell J. I am of the same opinion. I think that when the question is fully examined it becomes clear. The Act begins by creating the liability of the employer in s. 1, which clearly applies to subjects whether domiciled in England or in Scotland. According to ordinary principles it would apply to Scotland, unless excluded, and, so far from being excluded, there are in other parts of the Act expressions which shew that it was intended to be included. We have not, therefore, to deal with any of the difficulties which might have arisen if this were the case of a foreigner, and we need not say anything about it. In the case where the workman resides in England and the employer is domiciled in Scotland, it seems to me to be perfectly clear that the right to receive and the liability to pay compensation is created by s. 1 of the Act. I think that it is important to look at s. 2, but only for one purpose. Sect. 2 makes the giving of a notice a condition precedent to the right to recover compensation, and it provides for the service of that notice by registered post. Having arrived at the conclusion that the Act applies to Scotland, it is perfectly clear that the provision as to service by registered post applies to a person who is in Scotland as well as to a person who is in England. Then the Act refers to two schedules. The 1st schedule relates to the scale and conditions of compensation. It is material only as shewing that the case of Scotland is contemplated because it contains definitions of certain expressions when applied to Scotland. The 2nd schedule, which provides for the manner in which compensation is to be recovered, is important. It is to be recovered by arbitration; and, if the parties do not agree otherwise, the matter comes before the county court judge in England, and in Scotland before the sheriff, who is a judge in a similar position to that of a county court judge in England. Then clause 9 of the 2nd schedule deals with the Court which is to have jurisdiction in any particular case. Speaking for myself, I entertain no doubt that the Legislature forgot the case of an accident happening in England when the employer was domiciled in Scotland, otherwise it would, I think, have been provided for either in this schedule or in rules of Court, which there was power to make. That, however, has not been done, and the question is whether we can find in clause 9 what Court ought to have jurisdiction. Clause 14 provides that, with reference to Scotland, "county court judge" shall mean "sheriff"; but there is no provision that "district" shall mean "sheriffdom," which we have been told is the technical expression in Scotland for what in England is called a "county court district." That omission raises a real and substantial difficulty. The word "district" is not a very technical word, but is of general application, and is, I think, common to both England and Scotland. It is not so technical that a definition is necessary, and there seems to me to be no real difficulty in holding that "district" means the area over which the judge, whether county court judge or sheriff, has jurisdiction. If that is so, the difficulty arising from the use of that word is removed, and the word "district" can be treated as a word of general meaning, to be applied according as the context requires. I agree also with my Lord that there is no real difference between saying "if they reside in different districts" or saying "if they do not reside in the same district." Seeing that the words "if they reside in different districts" follow the words in clause 9, "the district in which all the parties concerned reside," it seems to me that the former words clearly mean if the parties do not reside in that same district. The result, therefore, is that there is no real difficulty as to the Court which has power to entertain the matter. That brings us to what at first I thought was the real and great difficulty in the case—the difficulty first put forward on behalf of the employer. That is, that the county court has no power to effect service out of its jurisdiction unless that power is expressly given, and that, even if this particular county court was the proper court in which to take proceedings, there would still remain the difficulty as to how those proceedings could be initiated and carried on. I think, however, that that difficulty is met—though it may be by accident—because probably the

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words to which I am about to refer were not intended to meet such a case as this. The way to provide for such a case would of course have been by rules of Court, and on looking at the rules we find that rule 15 (2) of the Workmen's Compensation Rules provides that "service may be effected either in accordance with the rules as to service of default summonses, or by registered post in accordance with the provisions of sub-ss. 4 and 5 of s. 2 of the Act with reference to service of notice with respect to an injury, and the provisions of those sub-sections shall apply to such service." I have already pointed out that service by registered post of the notice of injury clearly may be made in Scotland, and we have here a provision that service of the necessary process for initiating and carrying on proceedings in the county court may be made by registered post. That seems to me sufficient to meet the difficulty as to how the proceedings are to be initiated in a case of this kind. Having regard, therefore, to the fact that it is always desirable to carry into effect the obvious intention of a statute, which in the case of this statute is to make the liability to pay and the right to recover compensation applicable to English and Scottish employers and workmen alike, and that it never could have been intended that there should be any difference when the parties happened to be domiciled in different parts of the kingdom, it seems to me that we are justified in holding that this county court has jurisdiction to entertain these proceedings.

Rule absolute.

Solicitors for plaintiff: *Helder, Roberts, Walton & Thomas, for Frank Lewis, Newport, Mon.*

Solicitors for defendant: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitor for county court judge: *The Treasury Solicitor.*

J. F. C.

In re LAWFORD & LAWRENCE.
Ex parte THE TRUSTEE.

1902
June 9, 12.

Bankruptcy — Pledge of Chattels by Debtors for Loan repayable on a certain Day—Redemption on the stipulated Date—Delivery of Chattels by Pledgee with Notice of Act of Bankruptcy—Fraud of Debtors—Title of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 49.

On September 14, 1900, A. & Co. pledged chattels with B. as security for a loan to be repaid on October 26 following; and on September 27 they pledged other chattels with B. as security for a further loan to be repaid on November 11 following. On October 26 B. delivered the chattels first pledged to C., who produced a written authority from A. & Co. as purchaser, and paid him off; and on November 11 C. came again to B. with a written authority from A. & Co. as purchaser of the chattels under the second pledge, and by arrangement with B. extended the date of redemption to January 11, 1901, when he paid off B. and took delivery of the chattels. B. acted in good faith, but when paid on October 26 had notice of an available act of bankruptcy committed by A. & Co. on the previous October 6; and when paid on January 11 knew that a receiving order had been made against A. & Co. on January 9. C. was in collusion with A. & Co., and was fraudulent in all that he did: he sold the chattels and disposed of the proceeds. The title of the trustee in bankruptcy related back to the act of bankruptcy committed on the previous October 6, and he claimed from B. the value of the pledged chattels less the loans :—

Held, that B. was not liable, for that, although not protected by s. 49 of the Bankruptcy Act, 1883, he was bound by his contract to deliver up the chattels when tendered on the date of redemption the amount due to him.

THIS was a motion by the trustee in bankruptcy claiming delivery of certain chattels, or payment of the value of them, under these circumstances.

In and prior to the year 1900 the debtors, Lawford & Lawrence, traded in co-partnership as cab proprietors and jobmasters at Rutland Gate and elsewhere. On September 14, 1900, they pledged with one Ward, who was a dealer in cabs and horses, a number of vehicles on a memorandum of deposit as security for a loan of about 430*l.* then made to them, to be repaid with interest on October 26 following; and on September 27 they pledged more vehicles with Ward in a similar way for a loan of 120*l.*, to be repaid with interest on the following November 11.

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LAWFORD & LAWRENCE, *In re.*

THE TRUSTEE, *Ex parte.*

On October 6, 1900, the sheriff sold the goods of the debtors at Rutland Gate under a writ of fi. fa., issued by a judgment creditor for a large amount.

On October 26 one Goss came to Ward and produced a written authority from the debtors, which stated that he had purchased the vehicles pledged on September 14, and he paid Ward the amount due on this pledge, and took delivery of the vehicles. On November 11 Goss came again to Ward with a similar authority from the debtors, and, as purchaser of the vehicles comprised in the pledge of September 27, arranged with Ward to extend the date of redemption to December 11, and then to January 11, 1901, when he paid off Ward and took delivery of the vehicles.

On November 28, 1900, a bankruptcy petition was presented against the debtors, on which a receiving order was made on January 9, 1901, and adjudication followed. The title of the trustee in bankruptcy related back to the act of bankruptcy committed by the debtors on the previous October 6, and he now claimed from Ward delivery of the vehicles comprised in the two pledges, or their value, less the loans.

It appeared from the evidence that Ward acted in good faith, but had notice of the available act of bankruptcy committed on October 6 when he was paid off on October 26, and knew of the receiving order when he was paid off on January 11, 1901. Goss was a man of straw, and was really the agent of the debtors, and was fraudulent in all that he did. He sold all the vehicles in January, 1901, and the proceeds were disposed of. The debtors had been prosecuted for fraud, and convicted, and sentenced to terms of imprisonment.

Carrington, and *F. Mellor*, for the trustee. Under the bankruptcy law Ward has no defence, unless he is within the protection of s. 49 of the Act. But the section does not apply, because he had notice of the act of bankruptcy of October 6, when he parted with the chattels to Goss. The onus is on Ward to shew a real purchase by Goss.

Muir Mackenzie, and *G. Lushington*, for Ward. Although Ward knew of the act of bankruptcy when he was paid off, he was a pledgee who had received the goods under a contract to restore them on being tendered the money on the date of redemption. He could not refuse to deliver them up, as the trustee's title did not arise until January 9. His duty was to give up the goods on payment by the person producing the pledgors' authority; and he was under no obligation, because he had notice of the act of bankruptcy, to wait and see if bankruptcy would ensue: *Wood* v. *Dunn* (1); *Ex parte Richdale.* (2)

[Wright J. referred to *Cannan* v. *South Eastern Ry. Co.* (3)]

If the trustee is right, Ward was bound to keep these chattels at his own expense for three months on the chance of a receiving order being made. If they had been horses, his expenses would have been great and the consequences to him very serious, for he would have had no one to look to for payment. And if he had refused to deliver them up, he would have been a wrong-doer and liable to an action for damages for trover: *Biddle* v. *Bond* (4); *Rogers* v. *Lambert.* (5) No doubt, the old law in bankruptcy is rather opposed to this contention: *Vernon* v. *Hankey* (6); *Foster* v. *Allanson* (7); but seizure and sale under an execution levied by the sheriff was not an act of bankruptcy under the statute 1 Jac. 1, c. 15. It was first brought in as an act of bankruptcy by the Bankruptcy Act, 1861: Griffiths and Holmes on Bankruptcy, pp. 143–4. Under the statute of James all acts of bankruptcy were the voluntary act of the debtor, and adjudication followed at once; but this act of bankruptcy is an involuntary act of the debtor, and only takes effect if a creditor chooses to take advantage of it.

Carrington, in reply. In *Vernon* v. *Hankey* (6) the same argument as to consequences was pressed, but without effect. In *Cannan* v. *South Eastern Ry. Co.* (3) the payment was made without notice of an act of bankruptcy. The old law still applies. If you have notice of an act of bankruptcy, you cannot treat the trustee as a non-existent person, and you can no longer safely deal with the debtor, because it is not his property or money : *In re Pollitt* (1) ; *Re Lowe* (2) ; *Powell* v. *Marshall, Parkes & Co.* (3)

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(1) (1866) L. R. 2 Q. B. 73.

(2) (1882) 19 Ch. D. 409.

(3) (1852) 7 Ex. 843.

(4) (1865) 6 B. & S. 225.

(5) [1891] 1 Q. B. 318.

(6) (1787) 2 T. R. 113; 1 R. R. 444.

(7) (1788) 2 T. R. 479.

WRIGHT J. In my opinion, Mr. Ward clearly knew of the seizure and sale by the sheriff under the execution. He also knew that the debtors were in difficulties ; but I think it is not shewn that he knew they were actually insolvent ; and certainly there is nothing to shew that he had any apprehension that proceedings in bankruptcy would follow the act of bankruptcy. But still, knowing of the execution and the sale as he did, he may be held liable to consequences. The trustee's title related back to the act of bankruptcy committed on October 6, the date of the sale, and Mr. Ward, inasmuch as he knew of that act of bankruptcy, is not protected by s. 49 of the Act. At the same time, although I have had very great doubt, and the question seems to me to be one of great difficulty and one of great consequence, I think he is not liable to have the order made against him for which the trustee asks. The short ground is this. It seems to me that, although it is quite true that the trustee took the debtors' interest in these vehicles by relation back as from October 6, the date of the act of bankruptcy, the trustee took that title subject to the contract by which Mr. Ward, as pledgee, was under the duty to redeliver the cabs when he was paid on the date named for redemption, and he had a right to discharge himself of that liability under the contract. That is the short ground of my conclusion, whether it is right or wrong, though it may be amplified in many ways. In my view of the case, Mr. Ward did no wrong. He was guilty of no conversion. He had not detained the vehicles in any other sense than that he had not given them up to the non-existent trustee or official receiver, which he could not do, and there was a contract under which he was bound to redeliver them to the pledgors. That is not like a case where money can be said to have been received by a person to the use of the bankrupt. Mr. Ward in this case had no option. He was under a duty, as I have said, and he had the vehicles on the very terms that he should return them when paid. It would have been an illegality and a wrong to the bankrupts, and to the trustee claiming the rights of the bankrupts indirectly, if Mr. Ward had not returned them according to his obligation. He was compellable to give up his security. He could have been sued instantly. On the other hand, if he had kept the vehicles he could have enforced his security over them provided the contract had continued; but, as the contract did not allow him to continue to hold them, I apprehend that he would have lost the right to enforce any security in the bankruptcy. I need not decide that point.

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(1) [1893] 1 Q. B. 455.

(2) (1890) 7 Morr. 25.

(3) [1899] 1 Q. B. 710.

The doctrine of *Vernon* v. *Hankey* (1) seems to me not in point for two reasons. First of all, it was a question of money and not a question of conversion; and, secondly, at the time when that case was decided—I presume it is good law still, but I need not decide that—the Act of 1 Jac. 1, c. 15, was in force. The acts of bankruptcy under that Act were almost all of them acts by which a bankrupt voluntarily put himself into the state of being a bankrupt, and the Act expressly says that upon his doing any of those things he shall be accounted and deemed to be a bankrupt, or some such words. He was made a bankrupt by his own act of bankruptcy under the statute, although the petition need not necessarily follow. I quite see the importance of this case, and the grave doubts there are about it; but I have stated the only conclusion I can come to. Supposing I am wrong, I fix the net value of the cabs at 700*l.* I say nothing about Goff. I think he was knowingly fraudulent in all that he did; but I see no reason whatever to connect Mr. Ward with Goff's fraud. I think however that, under all the circumstances, there ought to be no order as to costs.

Solicitor for trustee: *C. Jennings.*
Solicitors for Ward: *George Reader & Co.*

H. L. F.

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(1) 2 T. R. 113; 1 R. R. 444.

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June 18, 19.

KODAK, LIMITED, APPELLANTS *v.* CLARK, RESPONDENT.

Revenue—Income Tax—Company resident in United Kingdom holding preponderating Majority of Shares in Company Abroad—Control—Income Tax Act, 1842 (5 *&* 6 *Vict*. c. 35), *s*. 100, *Sched. D*, *Case* 1.

An English company carrying on business in the United Kingdom owned 98 per cent. of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors, &c., of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company:—

Held, that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax under the first case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the profits of the foreign company.

CASE stated by Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Finsbury, in the county of London, held on March 13, 1901, Kodak, Limited, appealed against assessments made upon it of 140,000*l*. for the year ending April 5, 1899, in respect of the profits for the portion of the year from November 21, 1898, the date of the formation of the company, to April 5, 1899, and of 365,515*l*. for the year ending April 5, 1900, both made under Sched. D of the Act 16 & 17 Vict. c. 34, and s. 100, Sched. D, Case 1, of 5 & 6 Vict. c. 35.

In the year 1880 the business of George Eastman of Rochester, in the State of New York, was established to manufacture and deal in photographic apparatus and materials. In 1884 the business was transferred to the Eastman Dry Plate and Film Company, an American company, which had established an agency in London, from which place business was carried on in the United Kingdom and with Europe. In 1889 this company sold its business in the United Kingdom and in all other parts of the world, except North and South America, to the

Eastman Photographic Materials Company, Limited, an English company registered under the Companies Acts. The business so sold was carried on by the English company wholly independently of and separately from the business of the American company, and the ownership of the two businesses was in separate companies. In 1890 the American company (the Eastman Dry Plate and Film Company) became merged in the Eastman Company of New York, and in January, 1892, this company was consolidated with another American company called the New Process Film Company into a single new corporation, under and pursuant to the laws of the State of New York, as the Eastman Kodak Company of Rochester, in the State of New York. This company continues to subsist according to the laws of the State of New York, and carries on the businesses of the Eastman Company and the New Process Film Company.

The Eastman Company and its successor, the Eastman Kodak Company, were independent of and distinct from the English company (the Eastman Photographic Materials Company, Limited), but the latter purchased from the former a considerable portion of the goods in which it dealt.

In 1898 it was determined to form a new company to acquire the business and property of the Eastman Photographic Materials Company, Limited, and also to acquire a large portion of the shares of the Eastman Kodak Company. It appeared that there had been a difficulty in getting supplies of goods from the Eastman Kodak Company, and that the principal object in view in acquiring the shares in the latter company was to secure for the new company the consideration and influence which would be due on business principles to the holders of a preponderating number of the shares.

On September 30, 1898, an agreement was entered into between the Eastman Photographic Materials Company; Limited, of London, and Mr. George Eastman of Rochester, New York, for the sale to him of the property and undertaking of that company.

On November 15, 1898, the English company of Kodak, Limited, was registered under the Companies Acts, and in the prospectus issued to the public by that company the following statements (inter alia) appeared :—

"This company has been formed for the purpose of acquiring the business and property of the Eastman Photographic Materials Company, Limited . . . . and not less than 95 per cent. of the shares of the American Eastman Kodak Company, thereby bringing under a single control all the Eastman Kodak companies covering the whole world.

"The services of Mr. George Eastman, the founder of the business and inventor of the Kodak transparent film, &c., have been secured for a period of five years upon advantageous terms."

"Mr. George Eastman, who is the vendor and promoter of the company, and who is selling to it at a profit, has fixed the price for the undertaking of the English company . . . . and at least 95 per cent. of the issued shares of the American company at 1,600,000*l*."

"The vendor is a director of the Eastman Kodak Company and of the Eastman Photographic Materials Company."

By the articles of association it was provided (inter alia) :—

"4. The company shall forthwith enter into and carry into effect an agreement for sale and services between George Eastman of the one part and the company of the other part."

"114. (5.) They may from time to time transfer upon sale or under the arrangement for joint working, or upon any other terms and in any manner which they shall deem to be for the benefit of the company, any separate business belonging to the company . . . . either to an individual or to another company . . . . provided that they shall not without the sanction of an extraordinary resolution sell the undertaking and business as a whole, or the general business carried on by it in England or in the United States of America."

"118. They may at any time and from time to time, by power of attorney under their seal, appoint any persons to be the attorneys of the company for such purposes and with such powers, authorities, and discretions . . . . as the directors may from time to time think fit."

"142. Every dividend shall be payable in London and in such other place or places as the directors may determine, and when payable elsewhere than in the United Kingdom at such rate or rates of exchange as the directors shall from time to time determine."

By an agreement between the vendor, Mr. George Eastman, and Kodak, Limited, it was provided that the vendor should act as joint managing director of the company, and in particular should have the management and control, and should use his best endeavours to promote, the interests of the American business of the company.

The by-laws of the Eastman Kodak Company provided that the trustees (i.e. directors) of the company should be seven, who should own at least five shares each in the capital stock of the company, and a majority of whom should be citizens and residents of the State of New York. Such trustees were to be elected annually by ballot at a meeting of the stockholders of the company. At such meeting the election of the trustees should be made by ballot by such of the stockholders as should attend for that purpose either in person or by proxy. At such election each stockholder should be entitled to as many votes as he owned shares in the company, and the persons receiving the highest number of votes were to be the trustees for the ensuing year.

Kodak, Limited, acquired the whole of the business of the Eastman Photographic Materials Company, Limited, as it stood, and carried it on without any change or interval. They also acquired from Mr. George Eastman a large number of shares in the Eastman Kodak Company, amounting to 98 per cent. of the total number of shares of the company. There are, however, and have always been, thirty additional shareholders, holding 818 shares of the Eastman Kodak Company, who are independent of Kodak, Limited, and whose shares Mr. George Eastman did not acquire. Some of these shares are held by the seven directors or trustees as qualifying shares.

It appeared that by the law of the State of New York Kodak, Limited, was unable to exercise any other power in or control over the Eastman Kodak Company than by its vote as a shareholder at the general meetings of the Eastman Kodak Company.

On January 27, 1899, Kodak, Limited, appointed Mr. George Eastman together with H. A. Strong and B. H. Clark, its proxies and attorneys, to vote for it and on its behalf at any meeting of the Eastman Kodak Company. The said B. H. Clark is a director or trustee of the Eastman Kodak Company, as are Eastman and Strong, who are also directors of Kodak, Limited.

It appeared that Eastman had voted once as proxy for Kodak, Limited, at a meeting of the Eastman Kodak Company, when he had voted for the reappointment of the directors. Save as aforesaid, it appeared that Kodak, Limited, had never in fact controlled or interfered in the management or business of the Eastman Kodak Company, nor attempted to do so, and had never taken any part in the declaration of dividend by the Eastman Kodak Company.

Kodak, Limited, has a number of shareholders resident in America who are entitled to such dividends as may be declared by it, and it has for its bankers in America the Rochester Trust and Safe Deposit Company. This company by direction of Kodak, Limited, receives as such bankers any dividends due to Kodak, Limited, from the Eastman Kodak Company, and retains such dividends in America, and a certain proportion of the sums so received by the bankers is utilised for the payment of dividends due to the American shareholders of Kodak, Limited.

The residue of the dividends has always been left with the Rochester Trust and Safe Deposit Company at the order of Kodak, Limited, and no moneys whatever attributable to the dividends coming to Kodak, Limited, from the Eastman Kodak Company have ever in fact been remitted to the United Kingdom.

It was contended on behalf of the company :—

1. That the business carried on by the Eastman Kodak Company was carried on in America, and neither wholly nor partly in the United Kingdom, and that there was no fact from which it could be found or held that the business was

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carried on in the United Kingdom, and, therefore, that no assessment could be made by or under the Income Tax Acts, in respect of the profits of the business, upon Kodak, Limited.

2. That the profits of the business of the Eastman Kodak Company were not the profits of Kodak, Limited.

3. That Kodak, Limited, had only such an interest in the business and profits of the Eastman Kodak Company as shareholders of shares in the latter company could have and no other; that they were entitled only to such profits as were converted into and distributed in the shape of dividends in respect of these shares and to nothing else.

4. That the dividends to which Kodak, Limited, were entitled in respect of these shares in the Eastman Kodak Company were taxable only (at most and if at all) under case 4 or case 5 of s. 100, Sched. D, of the Income Tax Act, 1842, and not otherwise.

5. That the said dividends upon the said shares of Kodak, Limited, in the Eastman Kodak Company were taxable only (if at all) to the extent to which they were actually received in the United Kingdom, and that, as no part of any such dividends had been received in the United Kingdom in fact, Kodak, Limited, were not taxable in respect of any part of such dividends.

6. That as no part of the said dividends had been constructively received in the United Kingdom, Kodak, Limited, could not be assessed in respect of any part of any such dividends.

7. That the Eastman Kodak Company and Kodak, Limited, were distinct and independent entities, and that the ownership by the latter of shares, even to the extent of 98 per cent. of the total shares in the former, did not make the business and profits of the former the business and profits of the latter, and that there was no evidence from which it could properly be found that the business or profits of the former were the business or profits of the latter, or that the business of the former was carried on or managed by the latter, and that the holding of shares was not such evidence.

The surveyor maintained—

1. That Kodak, Limited, having their registered office in England, were liable to assessments upon their total profits, including those of the Eastman Kodak Company.

2. That if Kodak, Limited, were held to be chargeable under cases 4 or 5 of the Income Tax Act of 1842, Sched. D, s. 100, then that the whole of the dividends of the Eastman Kodak Company, if not specifically, were constructively received in the United Kingdom.

Paragraph 15 of the special case was as follows: "After hearing and fully considering the whole of the evidence adduced on behalf of the appellant company and the surveyor of taxes . . . . we found as a fact that the English company controlled the American company from England, and that the head and seat and directing power of the appellants' company are at the appellants' registered office in London . . . ."

Paragraph 16: "We therefore held as follows:—

"1. That the American company is carried on by and is the business of the appellants, and that the profits and business are technically the profits and business of Kodak, Limited.

"2. That if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company . . . .

"4. That Kodak, Limited, is liable for its profits made in America under Sched. D, case 1 . . . .

"The question for the opinion of the Court is whether on the facts there was any evidence to justify our holdings . . . . and whether such holdings are correct in point of law or are erroneous."

Danckwerts, K.C. (*Kerly* with him), for the appellants.

The Attorney-General (*Sir R. B. Finlay, K.C.*) and *The Solicitor-General* (*Sir E. Carson, K.C.*), (*S. A. T. Rowlatt* with them), for the Crown.

[The following cases were cited or referred to in addition to those discussed in the judgment: *Gresham Life Assurance*

Society v. *Bishop* (1); *Rex* v. *General Commissioners of Taxes for Clerkenwell.* (2)]

Phillimore J. This is evidently a very important case in point of amount. The facts in it are numerous and complicated, but I have been so much assisted by the learned counsel on both sides that they have been brought in my mind to a very small point, and I am prepared to give judgment at once.

The Commissioners have found in an inferential form, upon the facts already found, that the American company—the Eastman Kodak Company—"is carried on by, and is the business of, the appellants, and that the profits and business are technically the profits and business of Kodak, Limited." Secondly, "That if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company"; and having so found, they state this question for the Court: "The question for the opinion of the Court is whether on the facts there was any evidence to justify our holdings, and whether such holdings are correct in point of law or are erroneous." They find, of course, a great number of other facts in the course of the case, and in paragraph 15 they find some of the facts—facts summing up the whole evidence—which have also to be considered; and I am bound to say at once that of the two findings in paragraph 15, I think only the earlier is in conflict with the holdings in paragraph 16. They "found as a fact that the English company controlled the American company from England, and that the head and seat and directing power of the appellants' company are at the appellants' registered office in London." As to their second holding there is no doubt; but with regard to the first, if the English company controlled the American company from England, it would seem to me (for reasons which I will give more fully in the course of my judgment) that the proper thing to do would be able to apply the principle of the case of the *San Paulo Ry. Co.* v. *Carter* (3), and to say that the American company was carrying on the business in England, and that the American company could be taxed in England. The view of the Commissioners is not that, but that the English company is to be taxed in England because the business which is carried on in America is substantially the business of the English company.

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(1) [1901] 1 K. B. 153.

(2) [1901] 2 K. B. 879.

(3) [1895] 1 Q. B. 580; [1896] A. C. 31.

Now, in order to arrive at conclusions of law in this case, I am guided by certain decisions. First of all, there is the case of *Colquhoun* v. *Brooks* (1), which establishes shortly that a sleeping partner in England in a business carried on abroad is taxable in respect of the income which he receives in England from that business, but is not taxable on the profits of that business or bound to return them; and when I have said that about *Colquhoun* v. *Brooks* (1), I have said all that is necessary for this case, except that I ought to quote the passage from Lord Herschell's judgment which was put before me in argument (2): "Indeed in this very case, if the business in which the respondent is a partner were disposed of to a joint stock company, and he retained his interest in the form of shares in that company, though the annual return to him might be precisely the same, he would, I take it, be clearly free from the taxation it is now sought to impose." Following on the case of *Colquhoun* v. *Brooks* (1) comes the case of the *San Paulo Ry. Co.* v. *Carter* (3), to which I have already referred. That case pointed out that in *Colquhoun* v. *Brooks* (1) the successful appellant was merely a sleeping partner, and that where the partners resident in England are not sleeping partners, but do a portion of the partnership work in England, or where it being a company doing the main part of its work abroad, there is still a controlling power and brain power exercised in England by a body of directors in England, that partnership is held to be, or that company is held to be, a partnership or a company which carries on its business partially—not wholly—in England, and by reason of this partially carrying on of its business in England is liable to be taxed. Then, following on those cases, comes the case of the *Bartholomay Brewing Co.* v. *Wyatt* (4), which, I cannot help saying, has, I think, been sometimes not sufficiently understood. My brother Wright's judgment in that case seems to me to rest, as he put it, upon two grounds. It was decided by him before the House of Lords had decided the case of the *San Paulo Ry. Co.* v. *Carter* (1), and therefore on the first ground it was not strange that he did not see the limitation of *Colquhoun* v. *Brooks* (2), and that he took a point which the *San Paulo Ry. Co.* v. *Carter* (1) shews not to be a good point; but the second point which he took is, I think, well worthy of attention, and I do not think it has been interfered with by any subsequent decision or withdrawn by the learned judge himself (3): "I think that in point of law whatever control is exercised by the English company is exercised by it as the holder of practically all the shares in the American company; and if that is so, the English company cannot be properly said to carry on the business of the American company at all." I need not read the following words. That passage shews that one must not make the leap from "control" to "carrying on business." A company may control another company; but it does not necessarily follow because an individual controls the company, or the company controls the company, or the company controls the individual, that the business carried on by the person or company controlled is necessarily a business carried on by the controller; and particularly is that the case when the machinery of companies is used and the controller is a company. I do not think my brother Wright's language in that case can be passed by, for it is, in my mind, very important. Then comes a group of cases, in all of which Mr. Apthorpe appeared as the surveyor of taxes and as the respondent, and I think that those cases require a little consideration; but when considered, it will be seen that no one of them covers this case. In the first of them—the *Frank Jones Brewing Co.* v. *Apthorpe* (4)—there was but one company in England carrying on the business in the United States, and for the purpose of the business there

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(1) (1889) 14 App. Cas. 493.

(2) 14 App. Cas. at p. 505.

(3) [1895] 1 Q. B. 580; [1896] A. C. 31.

(4) [1893] 2 Q. B. 499.

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(1) [1895] 1 Q. B. 580; [1896] A. C. 31.

(2) 14 App. Cas. 493.

(3) [1893] 2 Q. B. at p. 516.

(4) (1898) 15 Times L. R. 113.

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working through an American committee. All that the Court had to decide was, Did that come within the *San Paulo Case* (1) or did it not? Was so much of the brain power exercised out in America and so little in England that it did not come within the *San Paulo Case* (1), and that the company was an English company carrying on business in America, though, no doubt, largely carrying it on through an American committee, and, therefore, was taxable? In *United States Brewing Co.* v. *Apthorpe* (2) the facts were the same, except that the United States Brewing Company was carrying on the business in several States in America, in some of which it was not possible for a corporation to hold land, and did in those States carry on its business through the machinery of its native company—a company formed in that State—and while having by far the largest part of the interest in shares in those subsidiary companies, still had allowed those shares to be owned, or apparently owned, by individuals. Whether those individuals held them in their own right, or whether they held them merely as trustees for the company, is not very clearly found by the case; but the learned counsel who argued the case for the United States Brewing Company said this: "The only difference between this case and that of the *Frank Jones Brewing Co.* v. *Apthorpe* (3) is that two of the five breweries belonging to the United States Brewing Company are in the State of New York. In that State property cannot be held by an English company, and, therefore, an American company actually holds the breweries. But inasmuch as the committee of management is appointed from home by the English company, and for that reason the existence of the American company is only a question of title and machinery, I cannot distinguish this case from that of *Frank Jones Brewing Co.*" (3) I do not know that I quite follow his chain of argument in which he says: "and for that reason the existence of the American company is only a question of title and machinery." I think the gap in that argument should be filled in this way: "That inasmuch as I cannot rely on these three shareholders as having any substantial interest, and then it only becomes a question of where the actual work is done, I cannot distinguish this case." However, upon the case—which did not find that these three shareholders had any substantial interest—which did find that the company was formed merely in order to meet the rules of the State of New York—and upon the admission of counsel, the Court, which had already decided the *Frank Jones Case* (1), said they could see no distinction there; so upon that admission, and on those definite findings, they gave the same decision. I do not regard that case as touching this. Then comes the somewhat difficult case of *St. Louis Breweries* v. *Apthorpe* (2), where I cannot help thinking that the learned judges were allowed to suppose by some mistake that my brother Wright had withdrawn more of his judgment in *Bartholomay Brewery Co.* v. *Wyatt* (3) than in fact he had done; but, at any rate, there are two or three reasons why that case does not decide this; and the first reason is that in that case—as in the next I am going to mention—the Commissioners stated the parties out of Court. They found the facts. They did not say that they had put all the evidence upon which they found those facts into the case; they did not ask the Court whether the evidence in the case stated by them was sufficient to entitle them to find those facts; but they found the facts, and did not ask the Court whether or not there was legal evidence to support them, and they found that the business which was carried on in the United States was in fact carried on by, and was the business of, the appellant company, and that the profits made were the profits of the appellant company; and then there was a subsidiary finding too. That is the first reason why that case does not govern this. The second reason is this. There were (as in this case) two companies, and (as in this case) the great majority of the shares in the American company belonged to the English company, which was the controlling company; and (as in this case) there were a small number of shares (fourteen in all) which did not belong to the controlling company, thirteen of which were held by the directors (thirteen in number) out in America, who held one each; but there was no finding there that those directors held those shares in their own right and as independent people. There were several points in that case which would lead any Court to hold that substantially they were nominees, or trustees, or conduit pipes, and that the business of the American company was as much the business of the English company as if the English company had owned every share in the American company; and upon that the Court held (as I should myself be quite prepared to hold, even unguided by that case) that in those circumstances the mere existence of the paper company out in America did not prevent the business carried on in America being the business of the English company, and that, therefore, the English company was taxable for that business. Last of all comes the case of *Apthorpe* v. *Peter Schoenhofen Brewing Co., Ld.* (1), which is more important because it went to the Court of Appeal. There, as here, there were two companies. There, as here, the majority of the shares were in England. There, as here, there were a few shares left outstanding (in that case three); but there again the Commissioners found as facts that the business carried on at Chicago, in the United States of America, was in fact carried on by, and was the business of, the respondent company; and the Court of Appeal could not go behind those facts. Smith L.J., though he does, no doubt, discuss the facts, says at the end and at the beginning of his judgment that he was really concluded by the decision of the Commissioners in point of fact. He goes so far as to suggest that if the facts are incorrectly stated (and he evidently thinks it possible that they were) it would be possible to raise the matter upon a new assessment in another year. And Collins L.J. says, the Commissioners had stated the brewery company out of Court. More than that, there were two very important considerations in that case. First of all, in that case the English company not only bought the shares of the foreign company, but they bought the business and assets and goodwill, and everything else of the foreign company, and took transfers of everything except the real estate, which they were obliged to leave outstanding in the foreign company, and I think that it is upon that and the finding of the Commissioners that Collins L.J. decided. He found as a fact that they were carrying on the business as brewers in Chicago; and he, I think, considered that the American company was not so much the instrument with which they carried it on as the screen behind which they carried it on, and taking the two matters—that they had actually bought the assets in the business, and that the Commissioners found as a fact that it was their business—he had very little difficulty in deciding that they must be taxed upon it. The second point is this—that I do not find throughout that case any suggestion that the three outstanding shareholders had any real interest in their shares; and when I come to the judgment of Romer L.J., I feel sure that he assumed that they had no interest, however small, in those shares at all. I read from his judgment (1): "I think that intention was carried out. The business was taken over by the English company, and has since been managed under the direction of the English company, which acted in Chicago by its agents there, although, no doubt, the American company was kept on foot for the purpose of holding real estate in Chicago for the English company, and otherwise preventing American law from interfering with the carrying on of the business by the English company in America." Now, those are the previous cases.

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(1) [1895] 1 Q. B. 580; [1896] A. C. 31.

(2) (1898) 4 Tax Cases, 17.

(3) 15 Times L. R. 113.

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(1) 15 Times L. R. 113.

(2) (1898) 79 L. T. 551.

(3) [1893] 2 Q. B. 499.

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(1) (1899) 80 L. T. 395.

In this case the position is remarkable. No doubt Kodak, Limited, holds 98 per cent. (an enormous proportion) of the shares in the Eastman Kodak Company in America, but it does not hold the remaining 2 per cent., and it is stated—and the facts before me shew, as far as they stand—that the number of shareholders holding 2 per cent. of the whole shares are independent people, or most of them are independent people, having their own interest in the Eastman Kodak, Limited, to which they adhere, and in respect to which they must be considered. Now, that being the case, I do not think it can possibly be said that Kodak, Limited, though controlling and managing the Eastman Kodak Company, is, when the Eastman Kodak Company carry on business under its control,

(1) 80 L. T. at p. 400.

thereby itself carrying on the business. The Eastman Kodak Company carries on business for its 100 per cent. of shareholders; 98 per cent. of those are the English company, and it has to carry on its business, as far as it lawfully can, under the control of, and in obedience to, the English company and its nominees; but it does not carry on the business for the English company, but for the English company plus the 2 per cent in America; and when one comes to consider what the relations between the two companies are, one sees that it is very important to keep that provision in view. The American company are manufacturers and vendors, and the English company are buyers. Obviously, if the business of the American company was the business of the English company it would not matter, except as a matter of book-keeping and account, at what rates the goods transferred from the Eastman Kodak Company to Kodak, Limited, were debited and credited. It matters exceedingly to the 2 per cent. of the American shareholders that those goods should be debited and credited at the highest possible value which could be obtained for them in the market. Therefore, I think, though the English company controls the American company, the business which the American company carries on is not the business of the English company; and it is impossible upon the documents so to hold; and the matter being—except in respect of some oral evidence which was given, not on behalf of the Crown, but on behalf of Kodak, Limited—entirely a matter of documentary evidence and construction, I am bound to hold that there was no evidence on which the Commissioners could lawfully hold that the American company is carried on by, and is the business of, the English company, so that the profits and business of the American company are technically the profits and business of Kodak, Limited: 98 per cent. it may be of the profits and business are technically the profits of their business, but the whole are not. The second finding there is even more difficulty in supporting, and it is more easy to dispose of: "That if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company." They are not. They are a different entity with different constituents bound to carry on their business for the best advantage of those constituents: no doubt the English company is the principal constituent; nevertheless, the American company carries on the business for its own company, and not for the appellant company. As I have already said, and I now repeat, the statement in paragraph 15 does not help, but to my mind rather interferes with, the finding of the Commissioners in paragraph 16. They seem to have mixed up, and throughout the argument in this case there seems to be a mixing up of, two very different questions. First of all, Whose business is it that is being carried on abroad? That is one question. A company may be formed in England and there may be a sham company in America purporting to be carrying on business, and yet it may be the business of the English company carried on abroad. That is one question. Then the other question is, If the business is really carried on abroad, but the directorate —the company that carries it on—is in England, where is the control for the purpose of settling the question of taxation? One question is, Whose business is it? The other is, Who controls the one business? Now, the *San Paulo Railway Case* (1) and the *Frank Jones Brewery Company Case* (2) (and some others) deal with the question of, Where is the control? There is one business carried on in America—one business carried on abroad: Where is the control? If it is in England, then the business is partially carried on in England, and is taxable here. The other class of cases do not deal with that. They deal with the question of whose is the business carried on abroad, Is it the business of the English company, or is it the business of some one else? If it is the business of some one else, it matters not that the English company control it, supervise it, administer it; it is the business of the foreign company, and the foreign company own it. Therefore I think that, upon this case and these questions, I must give judgment for the appellants and remit the case to the Commissioners, directing them that there was no legal evidence upon which they could hold "that the American company is carried on by and is the business of the appellants, and that the profits and business are technically the profits and business of Kodak, Limited," nor that they could hold "that if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company." But this decision leaves at least two very serious questions, which may or may not have been pressed by the Crown, that have to be considered before this matter is finally settled. The first of these, which I confess I have only arrived at late in the course of this case, is whether the proper view is not that Kodak, Limited, ought to return as part of its profit, not merely the profits which it makes and the dividend which it receives from the Eastman Kodak Company, but, if for some reason or other it is more convenient to the Crown to have it in this way, the actual profits made by the Eastman Kodak Company. I am not at all certain that the true view is not that 98 per cent. of the profits of the Eastman Kodak Company ought not to be returned by Kodak, Limited, as part of its profits; but that point has not been argued before me, nor does the case probably state every fact necessary in order to determine that; and, of course, one must remember that no shareholder has a right to any profits until the dividends are declared. At the same time, remembering here what an enormous preponderance Kodak, Limited, holds of the shares, it may be that the true view here is that Kodak, Limited, ought to be taxed upon 98 per cent. of the profits of the Eastman Kodak Company. The other question, which is not of course raised in this case, is whether they ought not to include, at any rate in their return, the dividends declared—I do not say received, but the dividends declared—by the Eastman Kodak Company, and paid over to the agent of Kodak, Limited, in America, even if they never reach, in meal or in malt, this country.

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(1) [1895] 1 Q. B. 580; [1896] A. C. 31.

(2) 15 Times L. R. 113.

There remains again another question, which might or might not affect this case, as I have said earlier, upon the finding in paragraph 15 if that be correct (of course it does not bind the Eastman Kodak Company), that is whether the Eastman

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Kodak Company must not return its profits as a company carrying on its business partially in England, because the control and brain is in England, and whether under one of those clauses of the Act (which I have not carefully looked into) under which factors, agents, and stewards, and so on must make a return, the Crown may not compel Kodak, Limited, to make a return on behalf of the Eastman Kodak Company. Those are all matters which I am not determining to-day. I suppose that all I can do is to pronounce my opinion upon these two questions and remit the case to the Commissioners; and there will be the costs of the appeal.

Appeal allowed.

Solicitors for appellants: *Kerly, Son & Verden.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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IGOE, APPELLANT; SHANN AND OTHERS, JUSTICES FOR THE COUNTY AND CITY OF MANCHESTER, RESPONDENTS.

Licensing Acts—Licence—Renewal—Value of Premises—Objection—Break in Continuity of Licence—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

In the case of an application for the renewal of a beerhouse licence, the immunity from objection that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, exists only where there has been a licence kept in existence continuously by renewals from the passing of the Act down to the date of the application.

Judgment of the King's Bench Division, [1901] 2 K. B. 740, reversed by the Court of Appeal, Collins M.R. and Mathew L.J.; Cozens-Hardy L.J. dissenting.

APPEAL from a decision of a Divisional Court, reported [1901] 2 K. B. 740, on a case stated by the quarter sessions for the county of Lancaster, from which the following facts appeared.

The appellant was tenant of the Council Inn at Manchester, in respect of which he was licensed to sell beer by retail for consumption on or off the premises. On August 9, 1900, notice of objection to the renewal of his licence was served upon him, the material objection being that the premises were not of the necessary annual value. At the general annual licensing meeting for the city of Manchester, held on August 23, 1900, the case was adjourned to September 6, 1900, when evidence was heard and the case further adjourned to September 21, 1900, when the licensing justices refused to renew the licence upon the ground that the premises were not of the necessary annual value.

It appeared that the appellant's inn was originally licensed for the sale of beer by retail to be consumed on or off the premises in 1868, and that the licence was yearly renewed down to 1886. At the general annual licensing meeting in 1886 the renewal of the licence to Edwin Wade, the then licensee, was objected to, and at the hearing of the objection at an adjourned meeting the licence was refused. Wade continued to carry on business in the house until October 8, 1886, on which day he gave up possession to Jane Jackson, who became the new tenant and occupier, but did not at that date obtain any licence or transfer authorizing her to continue the business. The then current licence expired on October 10, 1886, two days after her entry, and Jane Jackson carried on business and sold beer by retail from October 8, 1886, to October 12, 1886, but not under a justices' licence. On October 12, 1886, she applied to a special licensing sessions under 9 Geo. 4, c. 61, s. 14, for the grant of a licence to her in respect of the premises; the licence was granted, and was annually renewed until September 21, 1900. The annual value of the premises on September 21, 1900, exceeded 15*l.*, but was less than 30*l.*, and the premises were situated in a city having a population exceeding 100,000.

It was contended on behalf of the appellant that, inasmuch as the house was on August 10, 1872, licensed for the sale of intoxicating liquors for consumption on the premises, the qualification in respect of annual value prescribed by the Licensing Act, 1872, s. 45 (30*l.*), did not apply to the premises, but that the qualification which did apply was that prescribed by 3 & 4 Vict. c. 61, s. 1, namely, 15*l.*

The respondents contended that the licence held at the time of the passing of the Licensing Act, 1872, having lapsed in 1886, the house thereupon ceased to be qualified to receive any other or new licence except upon the conditions as to annual value required by the Licensing Act, 1872, s. 45, and that upon the true construction of that section the conditions therein prescribed as to annual value applied to all licensed premises of which the licence had not been in existence continuously from August 10, 1872, down to the application for the renewal thereof, or to which a licence other than that existing on August 10, 1872, had been granted since that date.

The Court of quarter sessions held that the value qualification prescribed by the Licensing Act, 1872, s. 45, applied to the house, and dismissed the appeal upon the ground that the house was not of the necessary annual value as required by that section. (1)

The question for the opinion of the Court was whether the decision of the Court of quarter sessions was right.

The Divisional Court (Lord Alverstone C.J. and Lawrance J.) reversed the decision of the licensing justices and of quarter sessions. (2)

The justices appealed.

June 25. *C. A. Russell, K.C.*, and *Hildesheimer*, for the justices. It cannot have been the intention of the Legislature that exemption from the provisions as to value of premises as to which an application for a renewal is made should apply for all time, whether the premises have been used continuously as a beerhouse or not. The decision of the House of Lords in *Freer* v. *Murray* (1) on the analogous enactment in s. 19 of the Wine and Beerhouse Act, 1869, shews that a break in the continuity of the premises as licensed premises is a bar to the claim for renewal as a matter of right.

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(1) 35 & 36 Vict. c. 94, s. 45: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence.

"Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied: (*a*) The premises . . . . shall be of not less than the following annual value: If situated . . . . within the limits of a town containing a population of not less than 100,000 inhabitants, 50*l.* per annum; or if the licence do not authorize the sale of spirits, 30*l.* per annum."

(2) [1901] 2 K. B. 740.

Avory, K.C., and *Randolph*, for the applicant. The decision in *Freer* v. *Murray* (1) is not applicable to the present case. It should only be applied if the statutes are so similar that the same interpretation must be placed on both. In cases under the Act of 1869 everything turned on the application for renewal, while under the Act of 1872 there is a reservation of a right. The suggestion that the house can be used for another purpose for years without the loss of the right to a licence has no force, for the justices have a discretion as to renewal sufficient to cover that case. The two negatives in s. 45 are equivalent to an affirmative, and the effect is that this house does not come within the clause, and is subject only to the 15*l.* limitation under 3 & 4 Vict. c. 61. It is not admissible to read into the section of the Act of 1872 words which would take away an existing right.

[They cited *Hargreaves* v. *Dawson* (2); *Reg.* v *Curzon.* (3)]

C. A. Russell, K.C., in reply.

Cur. adv. vult.

July 8. COLLINS M.R. read the following judgment:—This is an appeal from a decision of the Divisional Court, consisting of the Lord Chief Justice and Lawrance J., reversing the decision of the licensing justices and of the quarter sessions in refusing a licence to the applicant. The facts are very shortly stated in the report of the case in the *Law Reports*. (4) [The Master of the Rolls read the facts as set out above, and continued:—]

The quarter sessions, affirming the licensing justices, had held that the continuity of the applicant's licence had been broken, and that, therefore, he was not entitled to claim a renewal of his licence unless the house in respect of which he claimed had complied with the conditions as to value laid down in s. 45 of the Licensing Act, 1872—in this case 30*l.*

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(1) [1894] A. C. 576.
(2) (1871) 24 L. T. 428.
(3) (1873) L. R. 8 Q. B. 400.
(4) [1901] 2 K. B. 740.

The case for the applicant was that under the second clause of that section he was exempted from the conditions of value therein imposed, and was bound only by those of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61)—namely, in this case, 15*l.* —and that the premises exceeded that value. The case depends on the meaning of the second clause of s. 45 of the Licensing Act, 1872. It is not, I think, necessary to refer to the first clause, which has perplexed the Courts and the text-writers: see Mr. Paterson's note to the section in his book on the Licensing Acts, and *Reg.* v. *Mann.* (1) It is admitted that this case depends on the second clause only. That clause is as follows: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied." The section, therefore, is framed to exclude from qualification for a licence after the passing of the Act any house not of the prescribed value unless at the time of the passing of the Act it is licensed for the sale of any intoxicating liquor for consumption on the premises. Its object, therefore, obviously was, while raising the standard of the value qualification for the future, to safeguard, to some extent at all events, the rights, such as they were, in respect to houses already licensed at the time of the passing of the Act; and the question is how far the Legislature must be taken to have enacted that such houses and their owners should be relieved from the burden of the new qualification.

It is contended by the applicant, the respondent here, and he was bound to contend no less, that this immunity is conferred once for all upon the house, provided it was in fact licensed at the time of the passing of the Act, quite irrespective of whether or not that licence has been continued by renewals, and no matter to what purpose it may have been applied in

(1) (1873) L. R. 8 Q. B. 235.

the interval between the passing of the Act and the subsequent application. It is contended, on the other hand, that the Legislature must have intended to continue the immunity only so long as the licence in existence at the time of the passing of the Act had been kept alive by renewals, and that the principle laid down by the Court of Queen's Bench and confirmed by the House of Lords in the parallel case arising under or created by s. 19 of the Wine and Beerhouse Act, 1869, must be applied to this legislation also. This makes it necessary to consider that section and the cases decided under it; for it seems to me that, when closely scrutinized, the two sections, though contained in different Acts of Parliament, are equally enacted with reference to the well-known practice of magistrates in dealing with the renewal of licences, and equally had for their object the safeguarding of existing licence-holders in respect of their licensed houses. Sect. 19 of the Act of 1869 (32 & 33 Vict. c. 27), when first passed, was, so far as is material, in these words: "Where, on the first of May 1869, a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused, in accordance with this Act." It was amended by an Act of the following year, but before that Act came into operation, the section was interpreted by the Court of Queen's Bench in *Hargreaves* v. *Dawson*. (1) It was there held that, though on the bare language of the Act the condition of immunity from objection on grounds other than the four named was simply that on May 1, 1869, a licence under any of the recited Acts was in force with respect to the house, to construe the conditions so narrowly would be to ignore the practice prevailing under the licensing laws and to defeat the obvious

(1) 24 L. T. 428.

intention of the Legislature, and the Court, therefore, construed those words as not extending to the case where a licence existing at the date of the Act had not been continued by annual renewals. The key to the decision is contained in the observation of Cockburn C.J. in the course of the argument: "Does not the 19th section imply that there is an existing licence?" That is, at the time of the application. The Legislature by the amending Act of 1871 (34 & 35 Vict. c. 88) expressly enacted (in s. 3) what the Court had so decided. The matter came up for discussion again in *Reg.* v. *Curzon* (1), after the amending Act of 1871 had been repealed, and the Court held that on the true construction of s. 19 of the Act of 1869, confirmed by s. 7 of the Act of 1870 (33 & 34 Vict. c. 29) the justices were not prohibited from exercising their discretion in the case of a house licensed on May 1, 1869, the licence or certificate of which had lapsed before the application for renewal; and they expressly approved the decision in *Hargreaves* v. *Dawson* (2), decided without reference to either of the amending Acts. The matter ultimately came before the House of Lords in the case of *Freer* v. *Murray* (3), where the decisions I have referred to were approved and the House held, under circumstances practically indistinguishable from those in this case as to the history of the licence, that the fact of the chain of continuity having been broken put the applicant outside the protection of s. 19, and left the justices an absolute discretion, as in the case of a new licence. On the argument in the Court of Appeal (4) Lord Esher M.R. expressly agreed with the view taken by the Court of Queen's Bench in *Hargreaves* v. *Dawson* (2), and approved in *Reg.* v. *Curzon* (1), on the construction of s. 19 standing alone and unamended. If, therefore, it is necessary for the applicant in this case to shew that his licence has been renewed up to the date of his last application, *Freer* v. *Murray* (3) is a clear authority in the House of Lords that he has failed to do so.

Is there then any substantial distinction between the legisla-

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(1) L. R. 8 Q. B. 400.
(2) 24 L. T. 428.
(3) [1894] A. C. 576.
(4) *Murray* v. *Freer*, [1893] 1 Q. B. 635.

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tion of s. 45 of the Act of 1872 and that of s. 19 of the Act of 1869 which would justify us in refusing to apply to the present case the principle of the decisions upon the Act of 1869 to which I have referred? I cannot think that there is. In the one case, that under the Act of 1869, the Legislature were continuing to persons licensed at the time of the passing of the Act a certain immunity which they then enjoyed, while as to persons not licensed they left unfettered discretion to the magistrates. So here they preserve for persons having licences at the time of the passing of the Act immunity from disqualification on the ground that their houses fall below a certain value, while to others who did not hold licences at the time of the passing of the Act they negative qualification unless their houses are of a much larger value. It seems to me that all the reasons which induced the Court to interpret the first-named Act as they did apply equally to the second. It is difficult to assign any reason in the one case more than in the other why the Legislature should have intended to enact arbitrarily that the condition of the house at the time of the passing of the Act should determine for ever the rights of the occupiers thereafter, quite irrespective of whether it continued to be used as a public-house or for any other purpose. The same reasons that led the Courts to insist in the one case that the section must be taken to refer to a licence kept continually in existence up to the date of the application apply equally to the other, and no reason was given in argument why any other intention should be supposed. Nor does it seem to me that there is any such difference in the language as to justify any valid distinction. That the language of the section in the one case is affirmative and in the other negative can surely make no solid difference. If the provision of s. 45 of the Act of 1872 be thrown into the affirmative, it seems to me that it cannot be distinguished from s. 19 of the Act of 1869. At my invitation Mr. Avory transposed the sentence thus: "Premises licensed at the time of the passing of this Act . . . . shall be qualified" —that is, on application—"to receive the licence, although the following provisions are not satisfied." If the premises are licensed a licence is "in force" with respect to them in the same sense as in the Act of 1869, and I think no effectual distinction can be made, because the words in the later Act in terms refer to the premises and not to the occupier. What the Legislature is considering in both cases is a right of the owner or occupier in respect of the premises. The interests they are safeguarding cannot be considered as dissevered from the owner or occupier. It is equally the right or expectation of the owner, in respect of the premises, which is to be safeguarded in both cases. Reliance was also placed on the words "an application" in s. 19 of the Act of 1869; but, as no question as to qualification can arise either for a new licence or a renewal except upon "an application," I can see no force in this argument. In fact, the provision of the Act of 1872 might be thrown into the exact words of s. 19 of the earlier Act, substituting "on the ground of value, &c.," for "except upon one or more of the (four) grounds, &c.," without in any way altering the sense.

For these reasons, I think that the decisions in the Court of Queen's Bench, the Court of Appeal, and the House of Lords upon the Act of 1869 have laid down a principle applicable to the interpretation of the section now in question, and that we are bound to adopt it. This view seems to me also to be in accordance with that taken by Cockburn C.J. in *Reg.* v. *Mann* (1), where he says, referring to s. 45 of the Licensing Act, 1872: "The first part of s. 45 must be taken to refer to houses already licensed, but to which, at the time of the passing of the Act, no licence under the Acts referred to in the Wine and Beerhouse Act, 1869, is attached, and it proceeds to enact that they 'shall not be subject to any of the provisions prescribing a certain rent, or value, or rating as a qualification for receiving any licence.' Such houses are excluded from the operation of the subsequent part of the section, which applies to premises not, at the time of the passing of this Act, licensed for the sale of intoxicating liquors. Then, with regard to future applications for new licences, the section provides that the premises shall be of a certain value, depending upon specified circumstances. I think, therefore, that this section is

(1) L. R. 8 Q. B. 235, at p. 239.

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intended to extend only to licences first applied for after the passing of the Act, as distinguished from the renewal of licences previously granted. The Legislature probably did not wish to interfere with vested interests; because it would be in some instances a hardship upon a man who has had a licence for many years, without any complaint of his conduct, to be compelled to find other premises, or to increase the value of those he occupies, either of which courses may be beyond his means or beyond physical possibility." For those reasons, with great respect to the Lord Chief Justice and my brother Lawrance, I am unable to agree with their decision, which, in my opinion, must be reversed and that of the quarter sessions restored.

MATHEW L.J. I am of the same opinion. It would have been satisfactory to me, if it were possible, to adopt the construction of the Act arrived at by the Divisional Court, and to hold that a substantial compliance with the provisions of the statute was all that was necessary. The objection seems to me to be technical in the highest degree. This, however, is a test case, and if the meaning of the Act is clear on the point it cannot matter what the length of time is during which the breach of continuity existed. It is said on behalf of the applicant that at the passing of the Act of 1872 the house was licensed for the sale of intoxicating liquors for consumption on the premises, and that it follows that the qualification in respect of value prescribed by that Act does not apply, and that for all time the premises are indelibly impressed with the exemption conferred by the section, whether the licence has been continuous or not. That contention must be considered with reference to the practice and the scheme of legislation with respect to licences. There may be a renewal by which a licence is obtained, or there may be a fresh grant by which it is obtained, and where there is a renewal the licence is, in effect, continued as a fresh annual grant. Beginning the discussion with the Act of 1869, s. 19 contemplated a future time at which the question would arise whether a licence in any given case was "in force" on May 1, 1869. A licence cannot be in force unless it has been renewed, and the statute contemplated the continuance of licences, from some date prior to May 1, 1869, in the only way in which they can be continued—that is, by renewal from time to time. If it has come to an end in the interval by reason of the non-renewal, the application is for a new licence. No doubt appears to have been entertained by the judges who had to deal with the matter; but if there had been a doubt it would have been removed by the language of s. 7 of the Wine and Beerhouse Act, 1870. That section runs thus: "The 19th section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st day of May 1869, whether such licences continue to be held by the same person, or have been or may be transferred to any other person or persons." That section was passed to remove a doubt, which appears to have been entertained, whether a transfer of a licence would not be a breach in the continuity of the licence. It provides against that doubt, and makes it plain that the section is dealing with the case of a licence continued from time to time by renewal up to the time of the application.

Coming, then, to the Act of 1872, the first clause of s. 45 is difficult to construe, and has embarrassed commentators and counsel; but it does not affect this case. The second clause runs thus: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied." And the conditions are then stated. One of them is a condition which, if applicable to this case, would require that the premises should be of the yearly value of 30*l.* On what footing does the case with which we are now dealing stand? To find out that we must see whether the premises "were not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon." To my mind we must construe that clause in a manner similar to that in which s. 19 of the Act of 1869 has been construed. In the construction of that Act, as I have already said, continuity of the holding of a licence is of the very essence of the right to the privilege intended to be given by the section, and the same construction must be placed on the later Act. It is unnecessary to go through the cases which have been referred to which confirm this view, and which received the final approval of the House of Lords in *Freer* v. *Murray*. (1)

In deciding as we do in the present case, we are doing no more than following the law as laid down in the House of Lords. It has been suggested that we are adding words to the Act; but in fact we are only construing it by saying that to bring a case within the exception from the condition as to value contained in the Act there must have been a continuous occupation of the premises for the purpose specified in the Act. No doubt our decision involves some hardship; but, on the other hand, it is difficult to suppose that the Legislature intended to abandon that which had been provided by statutes which were not repealed, and to create a new state of things in which continuity of occupation should not be necessary. If we were to decide that the short breach of continuity in this case was immaterial, it would follow that a longer interval, for instance, one of several years, would on principle be immaterial. I cannot adopt this view, however desirous I might be that it should be applied to the case before us. I agree, therefore, that the appeal must be allowed.

COZENS-HARDY L.J. read the following judgment:—The question raised by this appeal is whether it is lawful for justices, if in their discretion they think fit so to do, to grant a licence by way of renewal for the Council Inn at Manchester, a beer-house which has been continuously licensed since 1868 with an exception of two days in 1886, the house being of annual value less than 30*l*., but exceeding 15*l*. Although the interval during which the house was not licensed was extremely short, there has been a breach of continuity. The general discretionary power of the justices under the Act of 1828 was limited by s. 1 of the Act of 1840, which prohibited the grant of a licence in a city like Manchester unless the value of the house was 15*l*. per annum. This was the Act in force when the licence was first granted to the Council Inn. In 1872 an Act was passed altering the law in some respects, and the extent of the alteration now arises for our consideration. By s. 46 the section of the Act of 1840 to which I have referred was amended in an unimportant point, but as so amended it remained in full force. Sect. 45, so far as material, is in the following words: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence. Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied." One of these conditions is that in a place such as Manchester the value must be 30*l.* per annum. Now, as a matter of construction, it seems to me that this Council Inn, which was licensed in 1872 under the Act of 1840, is not within the enacting part of the section which imposes new conditions. It is expressly excluded from the operation of s. 45, and is left subject to the Act of 1840. There is nothing to suggest that it can ever be brought within the operation of s. 45. There are two classes of houses subject to distinct statutory provisions. If, therefore, I am at liberty to construe the Act of 1872 apart from authority, I think the view taken by the Lord Chief Justice and Lawrance J. is correct, though I prefer to arrive at the same conclusion by relying not so much upon the opening words of s. 45 as upon the unrepealed section of the Act of 1840. It is, however, argued that we are bound by principles laid down by the House of Lords in *Freer* v. *Murray* (1) to hold that the enacting part of s. 45 applies to every case where there has not been an absolutely continuous enjoyment of a licence from 1872 downwards. I have not, however, been able to satisfy myself that there is any such analogy between s. 19 of the Act of 1869, which was under discussion in *Freer* v. *Murray* (1), and s. 45 of the Act of 1872 as would

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(1) [1894] A. C. 576.

(1) [1894] A. C. 576.

compel me to construe the latter as the appellants in this Court desire. Sect. 19 was a restriction upon the discretionary power of the justices under the Act of 1828. It disabled them from refusing a certificate in respect of a certain class of houses except for specified reasons. It applied only to licences "in force" on May 1, 1869, where "an application for a certificate" was made. It was held by the Court of Queen's Bench that the application there referred to was an application for a renewal only, and that when once a licence had been dropped a subsequent applicant could not claim the benefit of the section. This was the interpretation put upon it by Parliament in subsequent declaratory statutes, and adopted by the House of Lords. But there are no similar words in the Act of 1872. There is no reference to an application. The only reference is to the house itself. I do not feel the force of the objection that Parliament in 1872 must be considered to have had in view only the protection of vested interests. In truth, there is no vested interest under s. 19 or otherwise to be protected in the case of the Council Inn. The renewal of the licence may be refused by the justices if they think fit; but I am not prepared to say that they are precluded from granting an application for renewal merely on the ground that the annual value of the house is not 30*l*. It is needless to say that I have felt great hesitation in differing from the Master of the Rolls and Mathew L.J., but after mature reflection I am unable to dissent from the view adopted by the Divisional Court.

Appeal allowed.

Solicitors for appellant: *R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for respondents: *Crowders, Vizard & Oldham, for Hockin, Raby & Beckton, Manchester.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1902
July 9.

LEVI *v.* THE ANGLO-CONTINENTAL GOLD REEFS OF RHODESIA, LIMITED.

(TAYLOR, THIRD PARTY.)

Practice—Third Party—Counter-claim—Indemnity over against Person not Party to Action—Right of Plaintiff to issue Third-party Notice—Order xvi., *r.* 48.

The right given by Order xvi., r. 48, to a defendant, who claims to be entitled to contribution or indemnity over against any person not a party to the action, to issue a third-party notice, is applicable to the case of a plaintiff in an action against whom a counter-claim is raised by the defence, the plaintiff in such a case being in the position of defendant to the counter-claim.

Appeal from an order of a judge at chambers.

The action was brought by the plaintiff to recover fees alleged to be due to him as director of the defendant company. The defendants denied liability, and counter-claimed for calls alleged to be due from the plaintiff in respect of shares in the company applied for by and allotted to the plaintiff. The amount of the counter-claim exceeded the amount claimed by the plaintiff. The plaintiff issued a third-party notice under Order xvi., r. 48, and filed a copy and served the notice on one Taylor, who was named in the notice. The claim against Taylor was for an indemnity, and the ground of the claim was stated to be that Taylor had agreed to indemnify the plaintiff against loss or liability in respect of calls upon the shares applied for by the plaintiff, and had agreed to provide the necessary moneys to pay all calls that might be made, the plaintiff having applied for the shares as Taylor's nominee. Taylor entered an appearance, and attended a summons taken out by the plaintiff for directions. The master before whom the summons came on for hearing held that there was no jurisdiction under Order xvi., r. 48, to bring in Taylor as a third party, as the case of a counter-claim against the plaintiff in an action did not come within the terms of the rule.

On appeal by the plaintiff, Ridley J. reversed the decision of the master.

Taylor appealed.

Llewelyn Davies and *Denis O'Conor*, for Taylor, in support of the appeal. The rules 48 to 55 of Order XVI., which deal with third-party notices, are not applicable to the case of a plaintiff in an action. By rule 48 a defendant may give notice, and under rule 49 the party served is treated as desiring to dispute the plaintiff's claim in the action as against the defendant, or his own liability to the defendant. The same idea is carried through all the rules relating to the subject, and shews that the words "plaintiff" and "defendant" were used to mean plaintiff and defendant in the action. There is, consequently, no right on the part of a plaintiff against whom there is a counter-claim to bring in a third party. Even if there is jurisdiction, it is a matter of discretion whether it should be exercised. The result of the action might be in favour of the plaintiff on the claim, and of the defendants on the counter-claim. In that case the balance of the account would be in favour of the defendants; but, as between the plaintiff and the third party, if the latter is liable to indemnify the plaintiff, he could only do so in the action to the extent to which the defendants recovered judgment; so that there would be no final settlement as between him and the plaintiff in this action, and he would be liable to have a second action brought against him for the balance. [He referred to *Renton, Gibbs & Co.* v. *Neville & Co.* (1)]

C. H. Swanton, for the plaintiff, was not called on.

MATHEW L.J. In my opinion, the order appealed from must be affirmed. The first question for our decision is one of jurisdiction. It is said that though a right is given to a defendant to counter-claim against a plaintiff who claims contribution or indemnity against a third person, that third person cannot be brought in under the rules. I can see no reason in the nature of things why the plaintiff should not have this right. A counter-claim is a means of disposing, in the action in which it is raised, of a dispute between the parties which would otherwise have to be the subject of a separate action, and it is treated throughout the rules as if it were a cross-action. Under Order XXI., r. 11, where a defendant sets up a counter-claim which raises questions between himself and the plaintiff along with other persons, he has to add to the title of his defence a further title similar to the title in the statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action. That rule clearly supports what I have said as to a counter-claim being similar to a cross-action. The judgments of Lord Esher M.R. in *Stumore* v. *Campbell* (1), and of Bowen J. in *Amon* v. *Bobbett* (2) shew that a counter-claim is an independent action. If so, I can see no difficulty in allowing the plaintiff in the principal action, as defendant in the cross-action to bring in a third party for contribution or indemnity. It was said that this has never been done; but no authority was cited in which there has been a decision to the contrary effect. In my opinion, there is jurisdiction to allow a plaintiff against whom a counter-claim has been brought to bring in a third party under the rules relating to third-party procedure. On the question of discretion in making the order, if in any particular case it appeared that it would be embarrassing to bring in a third party and to have the right to contribution or indemnity determined in the action, it is open to a master or a judge to refuse to sanction that course. In the present case I can see no reason why all the questions raised should not be decided in this action. It was said that one possible result would be that the defendants would recover, not the whole of their counter-claim, but that amount less the plaintiff's claim, so that the plaintiff would get judgment against the third party for less than the full amount he claimed as indemnity, and thus his claim would be split up, and part recovered in this action and part in a subsequent action. This, as was pointed out by Cozens-Hardy L.J. during the argument, would be met by a declaration in the judgment that the defendants were entitled to recover the full amount claimed by them under their counter-claim for calls, if that amount is found to be due, and in that case the added third party, if liable to indemnify the plaintiff, would be bound by the declaration. The appeal must be dismissed.

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(1) [1900] 2 Q. B. 181.

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(1) [1892] 1 Q. B. 314.

(2) (1889) 22 Q. B. D. 543.

COZENS-HARDY L.J. Without considering whether for all purposes a counter-claim is equivalent to a cross-action, it appears to me that this case comes within Order XVI., r. 48. So far as the counter-claim in this action is concerned, the defendants are the movers in the matter, and are in the position of plaintiffs in regard to it. The plaintiff in the action, who thus assumes the position of defendant to the counter-claim, says that he is entitled to an indemnity over from Taylor in respect of the calls which form the subject of the counter-claim. I find a difficulty in imagining a case more within the words and the spirit of the rule, or one more fitted for the exercise of discretion in favour of allowing Taylor to be brought in as a third party. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *A. E. Timbrell.*
Solicitors for third party: *Spyer & Sons.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1902
July 21.

HUGHES *v.* THE PUMP HOUSE HOTEL COMPANY, LIMITED (No. 2).

Practice—Parties—Adding or substituting Plaintiff—Order XVI., *rr.* 2, 11.

Where an action has, through a bonâ fide mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff.

Appeal from an order of a judge at chambers ordering that Lloyd's Bank, Limited, should be substituted as plaintiffs in the action for the original plaintiff Hughes.

Hughes was a contractor who had done work for the defendants under a contract, and, a dispute having arisen, he brought an action to recover the amount alleged to be due to him under the contract. A question of law was raised in the action as to whether there had been an absolute assignment by Hughes of the debt, within s. 25, sub-s. 6, of the Judicature Act, 1873, to Lloyd's Bank, and on argument Wright J. decided that the assignment made by Hughes was by way of charge only. This decision was reversed by the Court of Appeal (1), and the plaintiff thereupon applied for an order for the substitution of Lloyd's Bank as plaintiffs. A master made an order to that effect, which was affirmed on appeal by Channell J.

The defendants appealed.

S. T. Evans, K.C., and *R. E. L. Vaughan Williams*, for the defendants. The decision of the Court of Appeal shews that Hughes has no cause of action against the defendants. Under these circumstances neither rule 2 nor rule 11 of Order XVI. applies, for a plaintiff cannot be introduced so as to make a new cause of action against a defendant and keep the action alive for the benefit of the new plaintiff: *New*

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(1) Ante, p. 190.

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Westminster Brewery v. *Hannah* (1); *Clowes* v. *Hilliard* (2); *Walcott* v. *Lyons*. (3) The rules apply where there has been a bonâ fide mistake, such, for example, as the use of a wrong name, and not to such a case as this, where the plaintiff intentionally instituted the action in his own name. The class of mistake that can be dealt with under these rules is illustrated by the case of *The Duke of Buccleuch* (4), where the action was brought in the name of an agent instead of in that of the owner of the cargo.

Bankes, K.C., and *L. M. Richards*, for the plaintiff. There has been a bonâ fide mistake as to a matter of law, and that is sufficient to enable the rule to be applied: *Duckett* v. *Gover*. (5) There is no distinction in principle between adding and substituting a plaintiff, and the proper course in this case is to substitute the assignees. In *Ayscough* v. *Bullar* (6) the case of *Walcott* v. *Lyons* (3) was distinguished, on the ground that in that case the question between the parties was not whether there had been a breach of trust, but whether the original plaintiff was an assenting party. *The Duke of Buccleuch* (4) is clearly a case of the substitution of a person who had a right for a plaintiff who had no right.

S. T. Evans, K.C., in reply.

COLLINS M.R. This is an appeal from an order of a master which has been affirmed by Channell J.

The plaintiff commenced an action against the defendants, and a question arose whether the plaintiff had made an absolute assignment of his claim against the defendants, or only an assignment by way of charge only, and on the decision of that point depended the plaintiff's right to bring an action. Wright J. took one view of the case, and the Court of Appeal took another, and that in itself is evidence that the plaintiff had made a bonâ fide mistake in commencing the action in his own name. That lets in the jurisdiction of the Court under Order XVI., r. 2, to order that another person should be substituted or added as plaintiff upon such terms as may be just. So long as the doubt as to who should bring the action was bonâ

(1) W. N. (1877) 35.
(2) (1876) 4 Ch. D. 413.
(3) (1885) 29 Ch. D. 584.
(4) [1892] P. 201.
(5) (1877) 6 Ch. D. 82.
(6) (1889) 41 Ch. D. 341

fide, there can be no question as to the jurisdiction of the Court, and on the facts it is plain that it was a genuine doubt. The two cases of *Duckett* v. *Gover* (1) and *Ayscough* v. *Bullar* (2) are clear authorities on the point raised before us. In each case the right asserted by the new plaintiff excluded that of the original one. In those cases plaintiffs were added, but there can be no difference in principle whether a plaintiff is added or substituted, and both adding and substituting are specifically mentioned in the rule. I think, therefore, that the objection raised by the defendants fails, and that the order was rightly made.

COZENS-HARDY L.J. This case seems to me to fall clearly within the words of Order XVI., r. 2. There has been a bonâ fide mistake of law as to whether there had been an absolute assignment of the plaintiff's claim, or an assignment by way of charge only. It is said that the rule does not apply where it is shewn that the plaintiff has no right of action; but there are abundant authorities to the contrary effect. In *Carswell* v. *Hyland* (3) there was an addition of a plaintiff in a case in which the original plaintiff was heir-at-law of a deceased trustee, and had no right of action, the right being vested in the added plaintiff as legal personal representative; and in others of the cases which have been cited the failure of the right of the original plaintiff to bring the action was the reason for the addition of another person as plaintiff. There is no difference, as was suggested, between the addition and the substitution of a plaintiff. When once the case is shewn to be within the rule, there is jurisdiction to add or to substitute. I think, therefore, the order appealed from was right.

Appeal dismissed.

Solicitors for plaintiff: *Patersons, Snow, Bloxam & Kinder, for Hadley & Dain, Birmingham.*

Solicitors for defendants: *G. J. Vanderpump & Son, for Daniel Evans, Brecon.*

A. M.

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(1) 6 Ch. D. 82.

(2) 41 Ch. D. 341.

(3) (1887) 3 Times L. R. 708.

C. A.

1902

July 14.

[IN THE COURT OF APPEAL.]

Ex parte WALLACE.

Justices—Rule against Justices—Refusal to do Act relating to Duties of Office—Practice—Application by Counsel—The Justices Protection Act, 1848 (11 *&* 12 *Vict. c.* 44), *s.* 5.

A motion for a rule against justices under 11 & 12 Vict. c. 44, s. 5, must be made by counsel.

Appeal from the refusal of a Divisional Court to grant a rule in the nature of a mandamus to justices under 11 & 12 Vict. c. 44, s. 5.

The applicant had moved in person in the Divisional Court for a rule calling on justices to shew cause why they should not hear and determine the matter of certain charges preferred by him; the Divisional Court refused to hear the application upon the ground that it was one which must be made by counsel, and could not be made by the applicant in person. The applicant appealed.

The applicant in person. The rule of practice that a motion for a writ of mandamus can only be made by counsel does not apply to a motion for a rule to justices under 11 & 12 Vict. c. 44, s. 5. Such a motion was in fact made in person in *Ex parte Lewis.* (1) [He also referred to *Reg.* v. *Biron.* (2)]

Collins M.R. We cannot hear this appeal. The rule of practice has been clear for many years that a writ of mandamus can only be moved for by counsel, and we have been referred by the master to a long series of decisions (though they have not found their way into the reports) to the effect that the same practice applies in the case of a motion under 11 & 12 Vict. c. 44, s. 5, for a rule in the nature of a mandamus to justices. It is true that such a rule was moved in person in *In re Lewis* (1); but the point does not appear to have been taken

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(1) (1888) 21 Q. B. D. 191.

(2) (1884) 14 Q. B. D. 474.

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in that case, and it cannot be treated as an authority in view of the settled practice of the Courts. We must, therefore, refuse to hear the application until the applicant has instructed counsel to make it on his behalf.

MATHEW L.J. and COZENS-HARDY L.J. concurred.

Appeal dismissed.

The applicant in person.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1902
July 8, 10, 11.

ROBINSON GOLD MINING COMPANY AND OTHERS *v.* ALLIANCE INSURANCE COMPANY.

Insurance (Marine)—Policy—Property of Alien Enemy—Loss before Commencement of War—Seizure by Enemy's Government of Property of its own Subject in anticipation of War—Warranty against " Capture, Seizure, or Detention."

Gold, the property of a mining company, which was incorporated and registered under the laws of the South African Republic, and carried on its business there, was insured with the defendants against (amongst other risks) " arrests, restraints, and detainments of all kings, princes, and people " during transit from the mines in the South African Republic to the United Kingdom; the policy contained a warranty against " capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." During transit the gold was removed from the train and taken possession of by the Government of the South African Republic on its own territory. The gold was taken in anticipation of an outbreak of war, which in fact occurred a few days afterwards, and the act of the Government in taking it was constitutional and in accordance with the law of the Republic; it was not restored to its owners. In an action upon the policy:—

Held, affirming the judgment of Phillimore J., [1901] 2 K. B. 919, that there had been a " seizure " of the gold within the meaning of the warranty, and that the defendants were, therefore, not liable on the policy.

Per Collins M.R.: The case also fell within the warranty against the " consequences of warlike operations, whether before or after declaration of war."

APPEAL from the judgment of Phillimore J. in an action on a policy of insurance on gold tried in the Commercial

Court. (1) The following facts appeared on the pleadings and admissions.

The plaintiffs were a number of gold mining companies owning property and carrying on business in the territory of the South African Republic, and were interested in a policy of assurance effected with the defendants at a premium of 2*s.* 6*d.* per cent. upon gold to be declared at and from the different mines to Europe up to a total amount of 500,000*l.* The subject-matter of the insurance was described as gold "at and from the mine or mines situated in the Witwatersrand Goldfields District as enumerated below, either direct or viâ any bank or banks, whether in charge of the assured or their employees or otherwise, to the railway station in Johannesburg, and then by rail to Port Elizabeth or Cape Town, and thence by steamer as below to destination in the United Kingdom $\frac{\text{and}}{\text{or}}$ France, including risk of craft and all land conveyance from despatch until delivered to addressees." The insurance covered all ordinary perils, and included "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." The policy contained the following condition: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

On October 2, 1899, consignments of gold to which the policy attached, and amounting in value to 221,950*l.*, were despatched under guard of an armed escort by rail from Johannesburg to Cape Town en route for London. At that date the commandoes of the South African Republic had been called out and the railway and its staff taken over by the Government, but no ultimatum had yet been delivered by the Republic to the British Government. Upon its arrival on the same day at Vereeniging, a frontier station in the territory of the South African Republic, the gold was removed from the train and was taken in charge by the resident justice, who was acting in pursuance of instructions sent to him by the Attorney-General on behalf of the executive Government of the Republic. On October 9, 1899, gold of the value of 11,800*l.*, to which the policy attached, and which while in transit from the mines to the coast had been deposited by the plaintiffs in a bank at Johannesburg, was seized at the bank by the authority of the executive Government, who prevented its being sent out of the country. None of the gold was ever returned to the plaintiffs. On October 11, 1899, war was declared by the South African Republic against Great Britain.

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(1) [1901] 2 K. B. 919.

The defendants pleaded that the warranty freed them from liability for the losses; that the losses were not caused by any peril insured against; and also that the plaintiffs' claim was contrary to public policy, following on the latter point the language of the defence in *Driefontein Consolidated Gold Mines* v. *Janson.* (1)

Evidence was called at the trial on behalf of the plaintiffs to the effect that the gold was lawfully taken under powers conferred upon the executive Government over both the persons and property of its subjects where war had actually broken out or was apprehended; that the commandoes had previously been called out for the defence of the country against an apprehended invasion, and that under those circumstances the executive council could lawfully requisition the gold and all other property of the inhabitants for the purpose for which the commandoes had been called out. No evidence was called on behalf of the defendants. Phillimore J. gave judgment for the defendants. (2) The plaintiffs appealed.

Lawson Walton, K.C., and *J. A. Hamilton, K.C.* (*John Dove* with them), for the plaintiffs. First, there was a loss of the gold by a peril insured against—namely, an "arrest, restraint, or detainment" by the Government of the South African Republic. Secondly, that loss was not within the warranty against "capture, seizure, or detention." It is clear from the evidence that when, in consequence of war having broken out or being imminent or other similar emergency involving danger to the State, the commandoes or burgher forces were called out and mobilized, property of subjects of the South African Republic could be "commandeered" or taken by the State for the purposes of national defence. At the time of the taking of this gold war was imminent and the commandoes had been called out. To be a seizure within the meaning of the warranty there must be an element of physical force in the taking. In the present case no physical force was employed in the taking of the gold, and no resistance was made by those in charge of it on behalf of the plaintiffs. No doubt the taking might be said to be forcible in the sense that the whole force of the State was in the ultimate resort behind the demand for the gold, in the same way as it would be behind a demand for income tax in this country; but it could not be said in the latter case that there was a forcible taking of the amount of the tax in the sense necessary to constitute a seizure within the meaning of the warranty. The taking of the gold was lawful by virtue of the general obligation imposed on all the subjects of the State to serve the State in person or by contribution of property in view of national danger. Such a taking is not in the ordinary course of law or administration; it is something extraordinary, which may or may not occur—an exercise of the prerogative of the State put in force for the protection of the body politic against subjects of the State, who are bound to submit to it. The owners of the gold no doubt protested against the taking of it, as a taxpayer in this country may grumble at having to pay a tax, but they submitted to the law.

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(1) [1901] 2 K. B. 419. Affirmed in the House of Lords, August 5, 1902. This point was not, however, taken in the arguments in the present case.

(2) [1901] 2 K. B. 919.

It is contended that a taking of property under these circumstances is an arrest or detainment of kings, princes, or people: see *Aubert* v. *Gray* (1), where the expression "arrests, restraints, and detainments," was held to apply to a seizure of a ship in consequence of an embargo laid upon her by the sovereign of the country of the assured for the purposes of war with another power. But such a taking is not within the warranty against capture, seizure, or detention. The word "capture" applies

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(1) (1861) 3 B. & S. 163.

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to a taking by the forces or ships of war of a belligerent State other than the State of which the assured was a subject; and the word "seizure," as used in the warranty, takes a colour from collocation with that word. It is not applicable to a lawful taking by the State of which the assured is a citizen. The cases shew that "seizure" involves an element of physical force, either applied in vindication of the law, or for the punishment of an illegal act, or mere wrongful force. For example, "seizure" includes the case of a ship forcibly taken possession of by a foreign Government in order to be condemned for smuggling: *Cory* v. *Burr* (1); and the case of a ship seized by mutinous emigrants on board: *Kleinwort* v. *Shepard* (2); but "seizure" has never been applied to the peaceful surrender by the owner of property lawfully demanded of him by the State of which he is a subject. It is not a seizure when the object of the taking is to prevent the depletion of the resources of the State or to strengthen them for the purposes of war. This was a somewhat primitive form of taxation for obtaining means to conduct warlike operations; the plaintiffs were under a legal obligation to submit to have their property commandeered, and that is not a seizure if force is an essential element: respect for authority is not submission to force. There may be seizures which are not arrests by the executive Government; but this is not one of them. Both the language of the policy and that of the exception must be construed, if possible; the one should not exclude the other.

[They also cited on this point *Lozano* v. *Janson* (3); *Rodocanachi* v. *Elliott* (4); *Johnston* v. *Hogg* (5); *Powell* v. *Hyde.* (6)]

The expression "warlike operations" in the warranty means warlike operations directed against the South African Republic, and is not appropriate to describe a risk arising from the act of the sovereign power of the State of which the assured was a citizen. This operation does not in its physical character resemble war; it is rather an operation of a financial nature.

(1) (1883) 8 App. Cas. 393.
(2) (1859) 1 E. & E. 447.
(3) (1859) 2 E. & E. 160.
(4) (1873) L. R. 8 C. P. 649.
(5) (1883) 10 Q. B. D. 432.
(6) (1855) 5 E. & B. 607.

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It is the actual operation that causes the loss which must be warlike.

Lord Robert Cecil, K.C., and *Hon. Alfred Lyttelton, K.C.* (*Loehnis* with them), for the defendants. The facts shew that the gold was entrusted to the railway company, who provided the escort; there was no agent of the plaintiffs present to assent to what was done, and the plaintiffs always protested against the seizure as illegal. At the date of the seizure the railways had been taken over by the Government, the civil Courts and civil administration generally had been suspended, and the country was being administered on a warlike footing by the administrative council; there was nothing in the least resembling taxation for war purposes. There was simply a seizure for the purposes of the country. The power to take precautionary measures in peace covers all that was done. This was not a loss within the perils insured against, if there was nothing more than an ordinary act of the executive Government and of municipal law: *Finlay* v. *Liverpool and Great Western Steamship Co.* (1); *Miller* v. *Law Accident Society.* (2) It is only within the perils insured against if there was a forcible taking of possession, and a forcible taking of possession is a seizure. If not seizure, it is clearly "detention," and is, therefore, within the warranty, which must be construed in its natural sense. A taking may be forcible, though it is in the exercise of a legal right. It is evident that the warranty deletes several of the perils; it does not merely qualify them, but strikes them out altogether.

[They cited on this point *Kleinwort* v. *Shepard* (3), *Cory* v. *Burr* (4); Parsons on Marine Insurance, p. 577; Phillips on Insurance.]

If this was not strictly a warlike operation itself, it was at any rate the consequence of a warlike operation.

Lawson Walton, K.C., in reply. The taking was not an exercise of the ordinary municipal law, but was an act of the executive Government at a time of emergency, justifiable on the principle of "Salus populi suprema lex"; it was clearly an arrest within the decision in *Aubert* v. *Gray*. (1) "Seizure" imports the notion of the exercise of force, and excludes the idea of a taking by lawful authority without resistance; the force may be legal or illegal. If the lawful authority is resisted, it has recourse to its sanction, and the force then used might be a seizure within the warranty. There is no authority in which "seizure" has been held to be applicable to a taking in the exercise of authority; all the cases where there has been held to be seizure are cases in which the taking was forcible.

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(1) (1870) 23 L. T. 251.

(2) (1902) 71 L. J. (K.B.) 551.

(3) 1 E. & E. 447.

(4) 8 App. Cas. 393.

Collins M.R. This is an appeal from the decision of Phillimore J., who held that the facts in this case fell under the exception in a warranty in an insurance policy. The facts are shortly as follows.

A large quantity of gold, worth between 200,000*l*. and 300,000*l*., was consigned by the plaintiffs, who were subjects of the Transvaal Government, or at all events living under the protection of the law of that country, to England, and a policy was effected to cover it during its transit. Amongst the perils insured against were "arrests, restraints, and detainments of all kings, princes, and people," and there was a further clause on which the discussion here arises—"Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." At the time that the gold was consigned, war had not been actually declared; but a few days before the declaration of war the gold, while on its way down to the coast and to England, was arrested by an order sent by telegram from one of the chief officials of the Transvaal Government to the authorities at the station of Vereeniging within Transvaal territory; although an ultimatum had not then been delivered, the commandoes had been called out, and the railway and its staff had been taken over by the Transvaal Government. The consignment was guarded by an armed escort, who were, on the facts which

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(1) 3 B. & S. 163.

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I have stated, the servants of the Government, and were there to enforce its will. When the train arrived at this particular station an official, armed with a mandate from the Attorney-General, came down and saw the station-master, and under his order this gold was removed from the train, taken over by the Transvaal Government, and its owners never saw it again or had any use of it.

Under these circumstances the assured claim on the policy under the clause insuring against "arrests, restraints, and detainments of all kings, princes, and people." They claimed under that familiar phrase of insurance law; the defendants in the first instance faintly contended that the case did not come under the clause in the policy making them liable, but they strongly contended that it was at any rate covered by the exception in the warranty against capture, seizure, &c. Upon the argument the counsel for the plaintiffs were in a position of considerable difficulty, because the risks against which the plaintiffs insured import in themselves some act of force by others against a person who does not of his own free will give them the right to possess themselves of his property—some act of force exercised by a superior paramount authority which he is not able to resist. The plaintiffs' counsel were obliged to introduce some element of superior force in order to let in the contention that the risk insured against was covered by the insurance, while at the same time they had to get out of the words "warranted free from capture and seizure"; they had to attenuate the transaction to the highest degree possible consistently with alleging that it fell within the policy while it did not come within the words of the exception. For that reason they have contended before us that what actually took place was merely the willing acquiescence of the owners of the gold in the constitutional and legitimate right of the Transvaal Government to invite owners under certain conditions to part with their property for what, if they only rightly understood it, was for their own benefit; they say that the transaction is deprived of all element of force, and that although there is an "arrest" within the meaning of the policy, there is nothing equivalent to a seizure within the meaning of the exception.

This difficulty has been too great even for the ingenuity of the plaintiffs' counsel; there was the exercise of an act of authority following on the calling out of the forces of the country and the suspension of the constitution, which let in the general principle "Salus populi suprema lex," involving under that a taking possession by the Government of private property for State purposes; and to say that that has no element of force in it and is not properly described by the English word "seizure" would, it seems to me, be an impossible contention, unless it were justified by the authorities. It involves a refinement upon the ordinary use of words which, I think, no person uninstructed in the law would think them capable of bearing. The suggestion that a subject or resident of the Transvaal, owing allegiance to its Government, or at all events subject to and under the protection of its laws, in surrendering so large a share of his property is not yielding to force, and that the act of taking possession of his property is not a seizure on the part of the authorities, seems to me incapable of serious argument.

We have been referred to the authorities, and it has been urged strenuously upon us that such an exercise of authority is in no sense, and can in no sense be, a seizure within the meaning of the exception; but, on looking at the authorities, instead of supporting that contention, they seem to support a directly opposite conclusion. In the passage which has been read from *Cory* v. *Burr* (1), Lord Selborne says: "The first question which has been considered in the argument has been what is the meaning of the words 'capture and seizure.' 'Warranted free' clearly means that the insurers are not to be liable for the things to which the warranty applies. I own I should have hesitated, even had there been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument, and which Brett L.J. seemed to think might have influenced him if there had not been authority against it—the view I mean that 'capture and seizure' in such a warranty must be taken to mean primâ facie belligerent capture and seizure only." That was one of the

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(1) 8 App. Cas. 393, at p. 395.

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points urged in the argument of this case in the Court below. "My reasons for saying so are that the word 'seizure' is used as well as the word 'capture.' I am disposed to agree that if the word 'capture' had stood alone, it might have appeared to point to a belligerent capture; but the addition of the word 'seizure' is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word 'capture,' and to let in other 'seizures,' such as Cotton L.J. suggests, by means of the revenue laws of a foreign State." Then Lord Selborne describes the facts of the case, which, in his judgment, really were a seizure. "The ship was seized in every sense we can put upon the word 'seize.' It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy or the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship." Every word that I have read applies to this case; but the plaintiffs contend that there forcible possession was taken, whereas in the present case it was not. But possession was taken under precisely similar conditions with the authority of the State. The Spanish authority sent the indicia of force, they sent certain craft which carried with them the authority of the Spanish Government—authority exercised over persons engaged in smuggling—and the British merchant yielded without resistance to this exhibition of power and authority. So, too, in the present case; there was nobody actually representing the consignee of the goods; the mandate given was that of an overwhelming authority, the escort of the train and the officials of the railway were all servants of the Government, and they were carrying out their mandate with regard to the consignment of gold. The owner was not present, and could not have resisted if he had been; but the fact that he was not present and did not resist does not deprive this act of its essential feature—namely, that of an act of paramount authority irrespective of the will or of the assent of the person against whom it was exercised.

There was, therefore, in my judgment, a seizure, and the cases clearly shew that a seizure is none the less a seizure because it may be justified under the law of the country by whose authority it is exercised; that is clear from *Cory* v. *Burr* (1); and is also put in a more concentrated form by Lord FitzGerald, who says (2): "I allude to the cases of *Powell* v. *Hyde* (3) and *Kleinwort* v. *Shepard* (4), which have been already commented upon. In the construction of this warranty it is observable that 'capture' and 'seizure' do not mean the same thing. 'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture,' and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority or by overpowering force." Those words in terms embrace what happened in this case. It was suggested for the plaintiffs that lawful authority must at all events be excluded, or not be taken to embrace the lawful authority of the country itself of which the person was a subject, and in this case the authority exercised was by the Government of the country of which the consignors were subjects. It seems to me that that distinction is not justified by the authorities, and the manner in which Lord Blackburn in *Cory* v. *Burr* (1) refers to *Havelock* v. *Hancill* (5), which he says is on all fours in its facts with it, shews that he did not regard as sufficient to differentiate those cases the fact that in *Cory* v. *Burr* (1) the seizure was by a Spanish authority, and, therefore, by a Government other than that to which the assured owed allegiance, whereas in *Havelock* v. *Hancill* (5) the seizure was by the British Government, the Government of which the assured was a subject; there is, therefore, no distinction, as it seems to me, between those two sets of facts. I quite agree with what Phillimore J. said upon the cases I have referred to, and he cited other authorities also. It is clear to me that this was a seizure—a seizure accompanied with the indicia of overwhelming force. The authority under which the seizure was effected was, as it seems to me, based not on any enacted law, but on the suspension of law—it may be a constitutional suspension of the law under existing circumstances—but the seizure was by force, and it is precisely the class of risk which is covered by the exception.

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(1) 8 App. Cas. 393.
(2) 8 App. Cas. at p. 405.
(3) 5 E. & B. 607.
(4) 1 E. & E. 447.
(5) (1789) 3 T. R. 277.

If the exception is read to the end it will be seen that it is intended to cover what appears to me to be the very thing which happened in this case; the end throws a light upon and gives a significance to the previous words. The exception runs: "Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." As was pointed out by the defendants' counsel, there is in the present case the preliminary and fundamental condition of warlike operations. There is the calling out of the commandoes, which in itself led to the suspension of the constitution, and was the primary cause of this seizure by introducing the principle "Salus populi suprema lex." What is that if it cannot be described as a warlike operation before or after the declaration of war? What was the meaning of calling out the commandoes in this supreme emergency? What was the emergency if war was not imminent? The act done was one which could only be justified by the fact that there was a supreme emergency letting in this maxim of law which is above law; it was an act of force, an act brought about by a state of war, and, as it seems to me, an act which would certainly come under the words "consequences of warlike operations whether before or after the declaration of war." It seems to me, therefore, that this case falls within more than one of the special exceptions under this warranty, that the judgment of Phillimore J. was right, and that this appeal must be dismissed.

MATHEW L.J. I am of the same opinion. It must be borne in mind that this is a policy of marine insurance, which is sought to be applied to the risks of land transit; the regard for old forms is such that an insurance of land risks is superadded to an insurance against maritime risk, without any clear alteration or modification of the terms of the original policy. The gold was taken and carried away by the Transvaal Government. Supposing this had occurred on the high seas, could anybody for a moment doubt that the gold would have been captured and carried away by the Government, and could anybody doubt that it would come within the terms of the marine policy? Nothing is said in the marine policy about a state of war; what is pointed at is a loss by "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality whatsoever." The description of the loss, if it had occurred on the high seas, would be that the gold was captured and carried off by the Transvaal Government. We have to apply this to transit by land, which means that losses analogous to those that occur at sea are to be borne by the underwriters on a policy containing this war risk. If capture and seizure are covered by the original words of the marine policy, capture and seizure on land under analogous circumstances are intended to be covered by the words of this policy. Now, what occurred here? It is said, on evidence which does not seem to me very satisfactory, that there was vested in the constitution of the Republic a right to set aside the law and seize, in the interests of the community, any property which was found within the territory of the Republic when war was imminent. Can it be doubted for a moment that an act done in exercise of this supposed principle of the constitution comes within the terms of the policy as originally framed without the exception? The plaintiffs' counsel are constrained to admit that it would, for otherwise they would be in serious risk of being outside the policy altogether. The policy would not have protected them unless they were compelled to admit that what occurred in this case was within the terms and spirit of the policy. If the policy had stood alone without the exception, there could not be the slightest doubt that the underwriters would have been liable for a loss occurring under those circumstances. The capture of the gold upon land was analogous to the capture of gold upon the sea, and the position which the plaintiffs are compelled to take is that the act is one for which the underwriters

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would be liable under the original policy, although it was done by the plaintiffs' Government, although it was not in time of war, and although the taking may not have been by the application of direct force and violence. Without making these concessions, the policy could not cover the risk in question.

Then we come to the warranty, and the character of warranties in these contracts is well known; the warranty is intended to withdraw from the protection of the policy certain of the risks which are primâ facie covered by it. It is said that this warranty does not have that effect, but falls short of withdrawing from the policy the risk insured against. Capture on the high seas of this gold would be within the terms of the policy; capture on land analogous to it would, as I have said, also be within the policy. Then comes the exception, "warranted free of capture," &c. It is argued that "capture" does not mean the same as "arrests, restraints, and detainments" in the earlier part of the policy because, first, capture implies war, and, secondly, capture implies violence. Then comes the word "seizure," as to which it is said that it means no more than capture, and that the same conditions apply—the existence of war or violence. I cannot doubt that violence was implied in the act of the Transvaal Government. The gold was intrusted to the servants of the Government as an escort, and at the time that the Government thought fit to exercise its supreme constitutional right the authority of those men who were in charge of the gold on behalf of the assured was withdrawn or overridden; there was nobody left to offer any resistance on the part of the assured; it is obvious that, if there had been a hint of resistance from any quarter, it would have been put down at once by the strong hand of what was called the law in that part of the country. The argument, in my opinion, wholly fails. Here there was a capture, for which no force was necessary; and there was a seizure, unaccompanied by any actual violence; nobody was set upon or injured in defence of this gold. Can there be any doubt that belligerency or an act of violence is not necessary? Belligerency, it seems to me, is entirely excluded by the terms of the warranty; and the other suggestion, that violence is absolutely indispensable,

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is far-fetched, and is certainly not indicated by the language of the warranty itself. The exception arises on the original contract, and strikes out of that original contract the war risk. I think the judgment was right, and should be affirmed.

COZENS-HARDY L.J. I am of the same opinion. The matter has been so fully discussed in the judgments which have just been delivered, and I so entirely agree with them, that I do not think I can usefully add anything.

Appeal dismissed.

Solicitors for plaintiffs: *Ingle, Holmes & Sons.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

THE KING *v.* THE ARCHBISHOP OF CANTERBURY AND ANOTHER.

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Feb. 3, 4, 5, 10, 14; *March* 3.

Ecclesiastical Law—Confirmation of Bishop-Elect—Objections on ground of Doctrine—Jurisdiction of Archbishop and Vicar-General—Mandamus—25 Hen. 8, c. 20—Costs in Mandamus.

Upon the confirmation of the election of a bishop-elect by the archbishop or his vicar-general, there is no jurisdiction to entertain objections to the confirmation founded upon questions of doctrine, and a writ of mandamus will not lie to the archbishop or vicar-general to compel them to hear and determine such objections.

Reg. v. *Archbishop of Canterbury*, (1848) 11 Q. B. 483, discussed.

Semble, a mandamus will not lie to the archbishop to compel him, before proceeding to confirmation, to inform his mind of the fitness of the bishop-elect.

The archbishop has jurisdiction to require notices of objections to be delivered before the date of the confirmation, and to hold a preliminary meeting in chambers for the purpose of considering the objections.

Where the Crown is a party to the argument of a rule for a prerogative writ of mandamus, the Court has no jurisdiction to give costs either to or against the Crown.

RULE NISI to the Archbishop of Canterbury and to his vicar-general, Charles Alfred Cripps, Esq., K.C., to shew cause why a writ of mandamus should not issue directed to them commanding them or one of them, at a Court to be therefore duly holden in the cause or business or matter of the confirmation of the election of the Rev. Charles Gore, D.D., to the Bishopric of Worcester, to permit and admit to appear in due form of law Alexander William Cobham, chairman of the Church Association, to oppose the said confirmation of the said election, and to hear and determine upon such opposition and upon the articles, matters, and proofs thereof. A similar rule had been obtained on behalf of Edward Henry Garbett, and the two rules came on together for argument. The facts were as follows:—

On December 19, 1901, a congé d'élire was issued by warrant under the King's sign-manual to the Dean and Chapter of Worcester granting them leave and licence to elect a bishop of the see. This was accompanied by a letter recommendatory or letter missive of the same date naming and recommending the Rev. Charles Gore, D.D., Canon of Westminster, for election, and requiring the dean and chapter to proceed to the election and to certify it under their common seal.

On December 27, 1901, Canon Gore was unanimously elected bishop by the dean and chapter, and the election was duly certified to the King, the Archbishop of Canterbury, and the bishop-elect.

On January 11, 1902, by warrant under the King's sign-manual addressed to the Archbishop of Canterbury and all other bishops therein concerned, the Royal assent was given to the election, and the archbishop and bishops were required and commanded to confirm the election and to consecrate the bishop-elect.

On January 16, 1902, the fiat of the archbishop for the confirmation, addressed to the vicar-general, was granted in these terms: "Let the confirmation of the election of the above-named Charles Gore as Bishop of Worcester be granted." On the same date the archbishop issued his citation for the business of the confirmation. This was in the usual form, except that the Church House was named as the place for the ceremony instead of the church of St. Mary-le-Bow, and that by a note at the end it was notified that the vicar-general would sit in chambers to hear objections. Omitting formal parts, the citation was as follows: "and whereas in obedience to His Majesty's Royal commands (as is our duty) to proceed in the said business of such confirmation according to the tenor of the laws and statutes of this realm in that case published and provided we have decreed all and singular opposers (if any such there may be) who shall say against, except to, or oppose the said election, the form thereof, or the person elected, to be cited and summoned to appear on the day at the hours and place and for the purposes underwritten, justice so requiring: To you therefore jointly and severally we commit and strictly enjoin and require you to cite and cause to be cited peremptorily with a loud and audible voice in the Church House in the city of Westminster, and also by affixing these presents in some proper place within the Church House or other public places where it shall be most expedient, all and singular opposers (if any such there may be) in special or in general who against the said election, the form thereof, or the person so as aforesaid elected shall say, except to, or oppose; that they and every of them appear before us, our vicar-general, or his surrogate in the Church House aforesaid, on the 22nd day of January instant, between the hours of nine in the forenoon and two in the afternoon of the same day, with continuation and prorogation to be made of days then following and places if need so require, to say against, except to, or oppose the said election, the form thereof, or the person elected, if they think themselves concerned, in due course of law. And further to do and receive what shall be just and the nature and quality of the said business demand and require of them. Moreover, that you intimate or cause to be intimated peremptorily in manner and form before recited all and singular opposers (if any there be), in special or in general, whom we do also so intimate by the tenor of these presents, that if the said opposers so cited shall appear on the said day, hours, and place before us, our vicar-general aforesaid, or his surrogate, and against the said election, the form thereof, or the person elected shall say, except to, or oppose, or not, we will nevertheless proceed and intend to proceed in the said business of confirmation according to the exigency of the laws and statutes of this realm, or so will our vicar-general aforesaid or his surrogate aforesaid proceed and intend to proceed, the absence or other contumacy of the so cited, intimated, and not appearing in anywise notwithstanding. And what you shall do or cause to be done in the premises you shall duly and authentically certify us or our aforesaid vicar-general or his surrogate, or so let one of you certify who shall execute this our mandate."

The note at the end of the citation was in the following terms:—

"N.B.—Persons claiming to be heard as objectors must deliver notice of their objections in writing at the office of the Provincial Registry, No. 3, Creed Lane, Ludgate Hill, before 4 P.M. on Tuesday, the 21st Jan. instant.

"No objection will be considered unless such written statement has been delivered. The vicar-general will sit in chambers, at committee room No. 2, at the said Church House, at ten o'clock A.M. on Wednesday, the 22nd instant, to consider any objections which may have been delivered, and no objector who does not appear in chambers and establish his right to appear and be heard can appear or be heard during the business of confirmation."

Allegations of objectors were duly filed on behalf of several persons or public bodies; the name of Captain Cobham, one of the prosecutors, did not appear as an objector, although he was a member of the Church Association, on whose behalf objections were filed; Mr. Garbett, the other prosecutor, was an objector. The objections in the first case alleged that the bishop-elect was not a prudent and discreet man, and not a fit and proper person to fill the office of bishop, on the ground that both orally and by his published writings he had used language calculated to cause pain and distress to, and to shake the faith of, many earnest believers, thereby causing scandal and creating division and strife in the Church, certain passages of his published writings being set out; there were further objections on the ground of his membership of certain named societies, of whose doctrines he had expressed no disapproval, though he had retired from them at that date. The objections in the second case, which were in substance the same, alleged that he had published books containing declarations of doctrines contrary to the articles of the Church of England, which erroneous doctrines he had never withdrawn or disavowed, and that he was by the views and opinions which he avowedly held in reference to the doctrine and practices of the Church of England unfit to be intrusted with the care and superintendence of a diocese.

On January 22, 1902, the vicar-general sat in chambers in a committee room in the Church House at 10 A.M.; the objectors, their counsel and solicitors, and the general public were admitted to the sitting. The objections were considered, and protests made against the power of the vicar-general to hold a sitting in chambers at all; these protests were overruled by the vicar-general on the ground that the archbishop had full power over all matters of procedure in connection with the business of confirmation. The vicar-general further informed those present that when the objections, which all went to matters of doctrine, came to be made in open Court, he would be compelled to overrule them and to hold that the objectors could not be heard. The signature of the bishop-elect to the schedule of consent to the election was then affixed in a separate room.

The vicar-general and his registrar, accompanied by the advocates for the dean and chapter and for the bishop-elect and the proctor for the dean and chapter, then proceeded to the hall, where the business of the confirmation was to take place, and the business proceeded in the following order. After morning prayers the proctor for the dean and chapter exhibited his proxy and the King's letters patent for the confirmation, and prayed that they might be read, which was done by the principal registrar. The proctor then prayed the vicar-general to take upon him the duty of the confirmation, and the vicar-general decreed that it be proceeded with. The proctor then presented the bishop-elect, and exhibited the original mandate (1) with certificate indorsed thereon, and prayed that the opposers might be publicly called; they were then called by the apparitor-general. Various objectors then rose to enter protests, and the names of those who claimed to appear and had sent in written objections were read by the vicar-general, who proceeded in the following terms to give his reasons for refusing to entertain any of the claims to appear:—

"Questions having been raised as to the form of procedure to be adopted and as to the power of the archbishop over matters of procedure, I propose to state the grounds on which, in my opinion, the archbishop had full power to adopt the procedure which has been adopted on the present occasion—a procedure which, in my opinion, has ample justification. The Reverend Canon Gore having been, in pursuance of letters missive and congé d'élire, elected Bishop of Worcester by the dean and chapter, and that election having received the Royal assent, letters patent have been issued to the Archbishop of Canterbury commanding him to confirm the election. The archbishop has appointed me, as vicar-general of the Province of Canterbury, for the purpose of confirmation, and notice of the confirmation has been published with the citation of opposers. This citation (I think the archbishop has full power as regards the form of the citation) required the opposers to deliver their objections in writing before a date named, and stated that no objector who did not appear in chambers and establish his right to appear and be heard could appear or be heard during the business of confirmation. It was raised as a protest by counsel and others at the preliminary meeting that the archbishop had no power to issue the citation in the form in which it has been issued. In accordance with the terms of the citation certain objections in writing were delivered, and certain objectors appeared before me under protest at a preliminary meeting. The only point that they raised was that there was no jurisdiction to hold the preliminary meeting, or to determine any question as regards the rights of objectors at that stage. Without going in detail into the written objections delivered to me under the terms of the citation, I may state that they all raised questions of doctrine—questions which can under no circumstances be entertained at the business of confirmation. The procedure to be adopted in the business of confirmation is not regulated by the statute 25 Hen. 8, c. 20, under which the confirmation is held, and is not obligatory in form; but a particular form has been used in practice for some centuries, and it is not advisable to alter that form of procedure except so far as may be required to ensure a due and proper consideration of any objections, and to avoid unnecessary and possibly unseemly discussion during the progress of the ceremony itself. With this object it was considered advisable that all objections should be delivered in writing and should be considered by me at a preliminary stage in order to determine which, under the circumstances of the citation, could found a right in objectors to appear and be heard during the ceremony. I have no doubt whatever but that there is full power in the archbishop to issue the citation in the form which has been adopted. Having considered the nature of the objections delivered, I intimated to the objectors or their representatives, in chambers, and I now rule, that none of the objectors in reply to the citation are entitled to appear and be heard on the grounds mentioned in the written documents, and, further, I decide that it is not competent for me to entertain any application to appear by objectors who have not conformed to the conditions stated in the citation. The questions involved in the claims of the opposers to appear and to be heard during the progress of the confirmation have been considered, and in the case of *Reg.* v. *Archbishop of Canterbury* (1) Dr. Burnaby, vicar-general of that day, who had as assistant commissioners Dr. Lushington and Sir John Dodson, decided that he was bound to proceed to confirm the election certified to have been made by the Dean and Chapter of Worcester, and that the opposers, their proctors and counsel, could not appear to be heard. Of course, I have not adopted that form of procedure in this case. That decision was discussed on a proceeding for a writ of mandamus, but the rule nisi was discharged as the Court of

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(1) That is, the citation to opposers, set out above.

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(1) 11 Q. B. 483.

Queen's Bench were divided in opinion. The point was again considered by Sir Travers Twiss in the case of Dr. Temple, and the report of the proceedings will be found in *The Times* of December 9, 1869. (1) Sir Travers Twiss affirmed the power of the archbishop over matters of procedure, and allowed that opposers could only state their objections on two points—namely, that the election in regard to some matter of form had been defective, and that the person presented for confirmation was not the person on whom the choice of the Crown had fallen—and he pointed out that such an objection would, if well founded, entitle the archbishop to rectify any informality in the form of the election under the peculiar power which he has to supply the defects, whatever they may be, in the election. There is, in my opinion, a convenience in considering the right to appear in connection with the proposed grounds of objection, rather than as an abstract question of technical right, and the decision which I give is covered by either of the decisions of my two predecessors to which I have referred. I wish to add, to prevent any possible misunderstanding, that any objector who could establish a right to appear in accordance with the terms of the citation would be heard by me during the public ceremony of confirmation. I understand that protests have been lodged against my ruling on these questions of procedure."

After several protests against this ruling by or on behalf of the objectors, which the vicar-general refused to entertain, the proctor accused the contumacy of persons cited and not appearing in the following terms: "I accuse the contumacy of all and singular persons cited, intimated, publicly called and not appearing, and in pain of such their contumacy pray that they and every of them be precluded from the means of further opposing against the said election, the manner thereof, or the person elected in this behalf, and that it be decreed to be proceeded to further acts in this business of confirmation, the absence or contumacy of the persons so cited, intimated, publicly called and not appearing in anywise notwithstanding, and I porrect a schedule which I pray to be read." The vicar-general then read and signed the first schedule, and the proctor handed in a summary petition, which was admitted by the vicar-general. Then the proctor, "in supply of proof of the matters contained in my said summary petition," exhibited the certificate of the election under the seal of the dean and chapter, the consent of the bishop-elect and the King's letters patent, and alleged the matters set forth in the exhibits to be true, and prayed all of them to be admitted, and that a term be assigned him to hear sentence instantly; which was done.

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(1) See also Phillimore's Ecclesiastical Law, i. 45.

[At this stage of the proceedings it is usual for the opposers to be again publicly called, but this second calling was omitted on the present occasion.]

The proctor then prayed that the definitive sentence might be pronounced and porrected a schedule, which he prayed to be read; the vicar-general read and signed the second schedule. The bishop-elect then took the oaths of allegiance to the King and of lawful and canonical obedience to the Archbishop of Canterbury, and made and subscribed the declaration against simony. The proctor porrected the definitive sentence in writing, which the vicar-general read and signed. The sentence, which was in the usual form, after the formal introductory matter proceeded thus: "Whereas, by the acts enacted, deduced, alleged, propounded, exhibited, and proved before us, relating to such confirmation, we have amply found and do find that the said election was rightly and lawfully made and celebrated by the dean and chapter . . . . of the said Reverend the Bishop-elect, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, of due age, and an ordained priest, and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority bishop of the said see. Therefore We, Charles Alfred Cripps, K.C., the judge aforesaid, having weighed and considered the premises and with the assistance of the learned in the law, do by the authority wherewith we are invested confirm the aforesaid election made and celebrated of the person of the said Reverend Charles Gore, D.D., Canon of the Collegiate Church of Saint Peter Westminster to the Bishopric of Worcester. And we do, as far as is in our power and by law we may, supply all defects whatsoever in the said election, if any there happen to be. And we do commit unto the said bishop elected and confirmed the care, government, and administration of the spirituals of the said Bishopric of Worcester. And we do pronounce, decree, and order by this our definitive sentence or final decree, which we make and publish in these presents, that the said bishop, so elected and confirmed, or his lawful proctor for him, shall be inducted into the real, actual and corporal possession of the said bishopric and of all its rights, dignities, honours, privileges, and appurtenances whatsoever, and be installed and enthroned. . . ."

The vicar-general, upon the prayer of the proctor, then decreed a public instrument of consent and letters testimonial to be made out concerning the premises, and the proceedings terminated.

Sir R. B. Finlay, A.-G., Sir E. H. Carson, S.-G., Dibdin, K.C. (*H. Sutton* with them), for the Crown, shewed cause against the rules. First, the archbishop is not bound, prior to confirmation, to hear objections to a bishop-elect based on matters of doctrine. Secondly, mandamus will not lie after confirmation has in fact taken place.

The main question depends upon the construction of 25 Hen. 8, c. 20, passed in the year 1533–4, and repealed by 1 Ph. & M. c. 8, ss. 9, 11, but re-enacted by 1 Eliz. c. 1, ss. 7, 10, its title being "An Act for the non-payment of first fruits to the Bishop of Rome." It recites fully the previous Act of 23 Hen. 8, c. 20, and describes it as having ordained, among other things, that the payments of the annates or first fruits, and all manner of contributions for the same, for any archbishopric or bishopric or for any bulls to be obtained from the See of Rome, should utterly cease, and no such be paid for any archbishopric or bishopric within this realm upon pain of forfeiture; and further, that if any person named or presented by the King to the See of Rome to be bishop of any see should be "letted, defrayed, or deferred" at the See of Rome from his bishopric by restraint or bulls of the Bishop of Rome, or should be denied the requisite bulls, the presentee might be consecrated in England by the archbishop of the province, "so always that the same person should be named and presented by the King for the time being to the said archbishop"; and further, that if he were delayed, &c., for lack of pall, bulls, or other requisite things to be obtained at the See of Rome, he should be consecrated in England, and should be installed and be accepted as an archbishop or bishop as prelates who had obtained their bulls and other requisite things from Rome, and should enjoy all the spiritualities and temporalities of his see in as full manner as his predecessors. The statute of 25 Hen. 8, c. 20, then states in s. 2 that the Bishop of Rome had been certified of the contents of the previous Act but had made no answer, and proceeds in s. 3 to state that it is not plainly and certainly expressed in the recited Act "in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm," and enacts that the recited statute is to stand, except that "no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the pope, or to the See of Rome, to or for the dignity or office of any archbishop or bishop within this realm or in any other the King's dominions, nor shall send nor procure there for any manner of bulls, breeves, palls, or other things requisite for an archbishop or bishop, nor shall pay any sums of money for annates, first fruits, nor otherwise for expedition of any such bulls, breeves, or palls," but that by the authority of the Act such presenting, nominating, or commending, and such bulls, breeves, palls, annates, first fruits, and other sums of money are to utterly cease. Then s. 4 enacts that at every avoidance of an archbishopric or bishopric the King may grant to the prior and convent, or to the dean and chapter, a licence under the Great Seal, "as of old time hath been accustomed," to proceed to election, "with a letter missive containing the name of the person which they shall elect and choose, by virtue of which licence the said dean and chapter . . . . shall with all speed and celerity in due form elect and choose the same person named in the said letters missive . . . . and none other." If the election is delayed above twelve days, the King "shall nominate

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and present" by letters patent under the Great Seal a person whom he shall think able and convenient; "and every such nomination and presentment to be made by the King's Highness . . . . if it be to the office and dignity of a bishop, shall be made to the archbishop and metropolitan of the province . . . . if the see of the said archbishopric be then full and not void." By s. 5, whenever any presentment or nomination is made by the King under the authority of the Act, "Every archbishop or bishop, to whose hands any such presentment and nomination shall be directed, shall with all speed and celerity invest and consecrate the person nominated and presented . . . . and give and use to him pall, and all other benedictions, ceremonies, and things requisite for the same without suing, procuring, or obtaining hereafter any bulls or other things at the See of Rome for any such office or dignity in any behalf." That being the procedure where the dean and chapter do not elect, the procedure in case of election is next dealt with, and it is provided that, if within twelve days the dean and chapter elect the person mentioned in the letters missive, "their election shall stand good and effectual to all intents"; that the person elected, after certification of the election under the common seal of the electors to the King, is to be reputed and taken lord elected of the dignity and office; "and then making such oath and fealty only to the King's Majesty, his heirs and successors, as shall be appointed for the same, the King's Highness, by his letters patent under his Great Seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishopric was void, if the see of the said archbishop be full and not void . . . . requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same without any suing, procuring, or obtaining any bulls, letters, or other things from the See of Rome for the same in any behalf." Sect. 6 then enacts that persons "chosen, elected, nominate, presented, invested, and consecrate" to the office of archbishop or bishop, and suing their temporalities out of the King's hands and making a corporal oath to the King, are to be thrononized or installed and be entitled to the spiritualities and temporalities of the see, &c. Then s. 7 provides that if the dean and chapter, after licence delivered to them, do not proceed to election and signify the same according to the tenor of the Act within twenty days after the licence comes to their hands; or if any archbishop or bishop "after any such election, nomination, or presentation shall be signified unto them by the King's letters patents shall refuse, and do not confirm, invest, and consecrate . . . . every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the King's letters patents of such signification or presentation shall come to their hands; or else if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this Act, that then every . . . . dean and particular person of the chapter, and every archbishop and bishop, and all other persons so offending and doing contrary to this Act or any part thereof, and their aiders, counsellors, and abettors, shall run in the dangers, pains, and penalties of the statute of the provision and præmunire made in" 25 Edw. 3 and 16 Rich. 2.

Four salient points are apparent on reading the statute. First, the preamble refers to the old practice of bishops-elect going to Rome for confirmation and obtaining bulls from the pope, in virtue of which they were consecrated in England. Secondly, the Act of 23 Hen. 8, c. 20, to which this Act is supplementary, provided for nomination by the King direct in case of delay. Under the later Act the dean and chapter are bound to elect the person named in the letters missive; if they fail to do so within twelve days, the King nominates the bishop by letters patent, and the archbishop proceeds at once to consecration without any intermediate ceremony of confirmation. Thirdly, particular attention must be given to the language used as to the duty of the archbishop in cases where the dean

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and chapter have obeyed the letters missive and elected the person named therein: the King is to signify to the archbishop, requiring and commanding him to confirm the election, and to invest and consecrate the bishop-elect. Lastly, if the archbishop does not within twenty days after the signification confirm, invest, and consecrate, he is liable to the penalties of a præmunire.

In construing this statute regard must be had to the state of the law at the date of its passing. This is well summarised in the judgment of Erle J. in *Reg.* v. *Archbishop of Canterbury* (the Hampden case) (1): "The reference to history leads me to the conclusion that bishoprics were donatives of the King under the Saxon and some Norman kings; that, from the charter of King John to the reign of Edward III., bishops were elected by the dean and chapter and confirmed by the archbishop; and that, from the reign of Edward III. to the time of this statute, the pope had superseded the archbishop, except on a few occasions when the papal see was powerless." That refers to the papal schism, when there was a pope at Avignon as well as at Rome, and (for a short time) a third pope at Pisa. Even in the charter of John (2), however, there is a reservation to the Crown of the right of refusal of assent, to be exercised for reasonable cause. The changes in the mode of creating bishops summarised by Erle J. are traced more at length in Hargrave's notes to Co. Litt. 134 a with regard to the statute of 31 Hen. 8, c. 9 (3), which was a statute for providing additional bishoprics; these were originally donative, but after the repeal of that statute the bishops of these sees were nominated by letters patent. The subject is also discussed at great length in Stubbs' Constitutional History of England. (4) In the result it is clear that there was great fluctuation in earlier days, but from the time of Edward III. onwards, except during the papal schism, the pope had drawn to himself the right of confirmation, and issued the bulls on which consecration took place. After the year 1316, however, there was no case of contentious confirmation in England, with the very doubtful exception of Wakeryng's case in 1416, which took place under the statute of 3 Hen. 5, during the papal schism, and which, when carefully examined, appears to have been in fact non-contentious. The Statute of Provisors, 25 Edw. 3, c. 6 (1), which deals with nominations by the pope to any ecclesiastical dignity before the occurrence of a vacancy, shews, in ss. 2, 3, that in case of any such "provision" by the pope the King was for that time to have the direct collation to the office.

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(1) 11 Q. B. 483, at p. 568; Jebb, 445. For convenience this case is cited in this report as the *Hampden Case.* The full title of Jebb's report is Jebb's Report of the case of Dr. Hampden.

(2) Jebb, 125, 126.

(3) Jebb, 172.

(4) Vol. i. pp. 134–5, 316–7; vol. iii. pp. 295–318 (small octavo edition).

The statute 25 Hen. 8, c. 20, must be read in the light of the fact that for 150 years previously confirmation had taken place at Rome. By it the dean and chapter are required to elect the person named in the letters missive (2); confirmation is a kind of sequel of election, the importance of which is to secure that all things shall be done in due form; if the dean and chapter elect, confirmation ensues; if they do not elect, then under the statute the King appoints by letters patent, and the archbishop is bound to proceed forthwith to consecration. Confirmation comes in only where there has been an election, and as a sequel to an election. It is impossible to suppose that there is so great a difference in the Royal prerogative according as the dean and chapter do or do not go through the form of election. It cannot be that if the dean and chapter elect, objections to the bishop-elect may be allowed, and that the final decision as to whether he is a proper person to be a bishop rests, not with the Crown, but with the archbishop, whereas if the dean and chapter do not elect the archbishop is bound to consecrate the person named in the letters missive. If the objectors are right, the only way that a dean and chapter can object to the person named in the letters missive is by electing him, and then opposing his confirmation; otherwise the archbishop would proceed at once to consecration without any intervening ceremony of confirmation at all. Under s. 7 of the statute the archbishop must confirm, invest, and consecrate the bishop-elect within twenty days at the risk of incurring the penalties of præmunire; this is inconsistent with any right or duty in the archbishop of examining the bishop-elect and rejecting him if heretical or otherwise unfit, and is decisive of the archbishop's obligation.

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(1) Jebb, 470.

(2) Co. Litt. 95 a, n. 4.

There are many cases in which confirmation is dispensed with altogether. First comes the case dealt with in the statute, of the dean and chapter not electing the person named in the letters missive. Secondly, the five new bishoprics created under the Act of 31 Hen. 8, c. 9, namely, Oxford, Peterborough, Chester, Gloucester, and Bristol, which for a long time were purely donative. Thirdly, suffragan bishops, who are still appointed under 26 Hen. 8, c. 14. (1) Fourthly, bishops of the Irish Church, who were appointed under 2 Eliz. c. 4 (Ir.) (2) by letters patent, the archbishop being bound to consecrate: this is of great importance as shewing a clear and long-continued practice in one part of the united Church of England and Ireland. (3) Fifthly, the Bishopric of St. Albans, which was created under 38 & 39 Vict. c. 34, s. 8. Sixthly, the Bishoprics of Liverpool, Newcastle, Wakefield, and Southwell, created under 41 & 42 Vict. c. 68, s. 6. Seventhly, the Bishop of Calcutta, who is appointed by letters patent under 53 Geo. 3, c. 155, ss. 49, 52. Eighthly, the Bishops of Madras and Bombay, appointed under 3 & 4 Will. 4, c. 85, s. 89. Ninthly, bishops in the Crown Colonies, who were originally appointed by letters patent, a practice still followed in the case of Mauritius, though in most cases of Colonial bishoprics that custom is now disused. In the result, only about twenty-five bishops are subject to confirmation. Leaving out of consideration the last case, the cumulative effect of the eight cases where confirmation is not required annihilates the contention that there is anything essential to the ecclesiastical position of a bishop in the ceremony of confirmation being conducted by the archbishop either with or without a preliminary examination. That this was the view of the construction of the statute which obtained in the middle of the eighteenth century is clear from the opinion of Sir James Marriott (1) in his MS. book of practice; the same view was also taken by Dr. Burnaby, Dr. Lushington, and Sir John Dodson in the *Hampden Case* (2), and by Sir Travers Twiss upon the confirmation of Dr. Temple as Bishop of Exeter. (3)

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(1) Jebb, 171.

(2) See Stephens' Ecclesiastical Statutes, vol. i. p. 401; Jebb, 139, 140.

(3) See *O'Brien* v. *Knivan*, (1620) Cro. Jac. 552.

In the *Hampden Case* (2) it seems to have been assumed by the objectors that at the date of the statute 25 Hen. 8, c. 20, there was an existing form of confirmation in England which involved examination of the bishop-elect by the archbishop; but this is a mistaken view, and unsupported by evidence. From the time of Edward III. confirmation had taken place at Rome, and the sole case of a confirmation in England during nearly 200 years was that of Wakeryng in 1416. This took place during the papal schism under the statute 3 Hen. 5 (4), which contains a statutory declaration of the practice of confirmation at Rome at that date, and makes interim provision during the continuance of the schism, which in fact ceased two years afterwards; under it there was to be confirmation by the metropolitan without excuse or other delay. *Wakeryng's Case* (5) in 1416 was a case of confirmation and consecration by the metropolitan, and was not contested. The other illustrations in the *Hampden Case* (2) of cases of confirmation between 1174 and 1316 are immaterial. The only case of any approach to an objection on the ground of doctrine is that of Thomas of Melsanby (6); but upon examination the objection appears clearly to have been, not on the ground of heresy, but of illiteracy and general unfitness. It is clear that in 1533 there was no existing practice of confirmation in England such as would be understood without a reference to it in the statute.

The practice after the statute is clearly illustrated by the preamble to 1 Edw. 6, c. 2, s. 1 (7) (repealed by 1 Ph. & M. c. 8, and not revived by 1 Eliz. c. 1). That recital says that elections of archbishops and bishops by the deans and chapters are no elections, "but only by a writ of congé d'élire have colours, shadows, or pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the King's prerogative royal, to whom only appertaineth the collation and gift of all archbishoprics and bishoprics and suffragan bishops within his dominions"; such a recital could not have been made if the form of election involved confirmation only after examination by, and satisfaction of, the archbishop. From this date until *Hampden's Case* (1) there is no trace of opposition to confirmation except in the case of Dr. Mountague in 1628, before Dr. Rives as vicar-general (2), where it appears that Dr. Rives overruled on technical grounds the objections to the confirmation; but that case is no authority, for it was obviously an excuse made when the parliament was inquiring into his action. The Institution of the Christian Man, or Bishop's Book, published in 1537, which at first sight seems to authorize examination before confirmation, is of no binding authority, and is in direct conflict with The Necessary Doctrine and Erudition, or King's Book, published in 1543, in which the passage in the former book relied upon by the objectors is expunged, and is indeed said to have been expunged by Henry VIII. himself. (3) In any view it does not refer to examination after nomination by the King, and it is not especially directed to appointments to bishoprics. [They also referred to Cranmer's Remains and Letters (Parker Society), pp. 16, 96; Strype's Life of Cranmer (1694).]

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(1) Jebb, 145.

(2) 11 Q. B. 483; Jebb.

(3) See Phillimore's Ecclesiastical Law (2nd ed.), i. 45; *The Times*, Dec. 9, 1869.

(4) Rotuli Parl., vol. iv. p. 71; Jebb, 350. For form of writ under this statute, see Rymer's Fœdera, vol. ix. p. 338.

(5) Wharton's Anglia Sacra (ed. 1691), vol. i. p. 417.

(6) Wharton, vol. i. p. 735.

(7) Jebb, 138.

As to the position of the vicar-general. His duties are stated by Sir John Lambe, Dean of Arches in 1636, whose report is in the appendix to Rothery's Return as to Ecclesiastical Appeals, at p. xxvi. (4), from which it appears that "he confirmeth the election of bishops." The authority of

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(1) 11 Q. B. 483; Jebb.

(2) Jebb, 145. Burn's Ecclesiastical Law (ed. 1809), vol. i. p. 206; 6 State Trials (N.S.), 427, note (b).

(3) Both these books are reproduced verbatim in "Formularies of Faith," edited by Charles Lloyd (Oxford, 1825).

(4) Commonly cited as "Rothery's Precedents." The parliamentary reference is 199 of 1868.

Oughton's Ordo Judiciorum (1) is important because of the distinct reference to the absence of contentious jurisdiction; it says: "Which chancellor or vicar-general in spiritual matters did not exercise those things which were of contentious jurisdiction . . . . except such things as are objected merely as a matter of form; for instance, the business of the election of bishops." And from tit. 5, at pp. 16, 17, it is plain that the vicar-general did not preside over the Court of Audience, though he might sit there as an official principal; the nature of that Court is dealt with in the report of the Ecclesiastical Commissioners for 1883, p. xx., and in Coke's Fourth Institute, p. 337, the latter of which says that it "dealeth with matters pro formâ as confirmations of bishops' elections"; it is clear, however, that Coke is there treating of the vicar-general and not of the Court of Audience; the distinction between the two is well brought out in the judgment of Lord Stowell in *Thorpe* v. *Mansell* (2), where it is said that the vicar-general is the representative of the bishop, and in later times has acted only in matters of voluntary jurisdiction where there is no litigation or contention, while as official principal he had a criminal jurisdiction.

If charges of heresy could be brought against a bishop-elect, we should look to find some form of procedure provided for inquiring into them; such cases require to be treated with extreme care, and the charges should be specifically mentioned: *Williams* v. *Bishop of Salisbury* (3); *Sheppard* v. *Bennett*. (4) The absence of any such procedure can only be accounted for on the ground that it is not competent to an objector to put forward such objections. It is impossible to imagine a trial for heresy without forms, without any safeguards, without the procedure necessary to ensure the fair trial of the case and due notice of the allegations. Such an inquiry as an informal trial for heresy could not be conducted within the twenty days limited by the statute. It might as well be contended that the

(1) Vol. i. Prolegomena, cap. 3, par. 10.

(2) (1810) 1 Hagg. Cons. 4, n.; Jebb, 227.

(3) (1863) 2 Moo. P. C. (N.S.) 375.

(4) (1871) L. R. 4 P. C. 371.

direction to the dean and chapter to elect meant that they were to elect if in their opinion the nominee was a fit and proper person.

Confirmation is in form a suit at the instance of the dean and chapter asking the archbishop to confirm the bishop-elect, and the objectors will contend that the forms used shew that confirmation is a matter of substance. But the forms have no binding authority. They are substantially the same as those used at the confirmation of Archbishop Parker in 1559, and they go back to 1535, about a year after the passing of the statute. The judgment of Sir Travers Twiss in the *Bishop of Exeter's Case* (1) shews that they have no statutory sanction and are not binding on the archbishop, though it has been the practice for three centuries to use them; they might be at any time changed by the archbishop, and they cannot affect the construction of a statute which is clear in its terms. It must also be remembered that in the vicar-general's Court only the opposers are cited; the bishop-elect is not cited, and is not a party to the suit.

The authority of the canonists, on whom the objectors will rely, is inapplicable to any procedure under 25 Hen. 8, c. 20, or to the construction of that statute. No doubt Lancelottus, who lived in the fifteenth century, in his Institutiones Juris Canonici (2), makes heresy a disqualification for an elector and schism a disqualification for the person to be elected, but a complete change was operated by the statute. And Ferraris, in his Bibliotheca Canonica (3), shews that on election three things were to be inquired into—lawful age, legitimate birth, and morals.

[They also referred to Lyndwood's Provinciale (temp. Henry V.), p. 218 (4); the Decretals of Gregory IX. and Sextus (5); the Commentaries of Otho and Othobon. (6)]

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(1) Phillimore's Ecclesiastical Law (2nd ed), vol. i. p. 45; *The Times*, Dec. 9, 1869.

(2) Bk. i. tits. 6–9 (Lugd. 1616; Magd. 1717); cited in Jebb, 108, 127–8.

(3) Vol. ii. p. 457 (Venice, 1782); Jebb, 109, 150, 153.

(4) Oxford, 1679. See Jebb, 113, 344.

(5) Corp. Jur. Can. (Richter's ed. Leipzig, 1881), vol. ii. p. 970.

(6) Printed in the Appendix to Lyndwood's Provinciale.

[WRIGHT J. Do you admit that any objections can be raised at confirmation?]

Only objections that go to personal identity, authenticity of documents, and other formal matters of that nature.

There is the further point that after confirmation mandamus will not lie.

[LORD ALVERSTONE C.J. On that point we are bound in this Court by the unanimous opinion of the Court in the *Hampden Case*. (1)]

Sir E. Clarke, K.C., and *Hansell*, for the Archbishop of Canterbury and the Vicar-General. There is a preliminary objection that neither of the prosecutors is entitled to a writ of mandamus. Captain Cobham was not present at the confirmation, was not an opposer, and gave no notice of objection; as a mere member of the public who did not attend the confirmation he is not entitled to take these proceedings. Although Mr. Garbett was present at the confirmation as an objector, his affidavit discloses no interest in the matter. It is clear from the judgments of Coleridge and Patteson JJ. in the *Hampden Case* (2) that a direct legal interest must be shewn to entitle a person to be an objector. In that case two of the prosecutors were incumbents in the diocese of the bishop-elect, and their interest was ample; here Mr. Garbett bases his claim merely on his membership of the Church of England. *Reg.* v. *Bishop of Chichester* (3) is a clear authority on this point.

[LORD ALVERSTONE C.J. If we discharge these rules on the ground of want of interest, it will be unnecessary to decide the main question.]

The objection is withdrawn. The course taken by the archbishop, acting through his vicar-general, was right. The authority of the vicar-general is derived from his patent from the archbishop, and the present patent commits and confers on him "the power and authority of us and our successors by virtue of these presents, and we do for us and our successors whomsoever give and grant to you the authority above and full power with the faculty and right of confirming all elections whatsoever of all bishops of our province of Canterbury." In the *Hampden Case* (1) the words were "to approve and confirm," language which excludes the idea of rejection. The authorities generally shew that when acting under his patent as vicar-general he is not a judicial officer; in the language of Coke (2), when dealing with the Court of Audience he meddleth not with contentious matters, and has authority only in matters of voluntary jurisdiction; to the same effect is the language of Lord Stowell in *Thorpe* v. *Mansell.* (3)

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(1) 11 Q. B. 483; Jebb.

(2) 11 Q. B. 483; Jebb, at pp. 449, 451, 479.

(3) (1859) 29 L. J. (Q.B.) 23.

[LORD ALVERSTONE C.J. That is in accordance with the view expressed in Lyndwood's Provinciale and Ayliffe's Parergon.]

The limits of the power and duty of the vicar-general in dealing with confirmations have been defined in a series of authorities. Sir James Marriott (4) says distinctly: "Confirmation must be despatched within twenty days, otherwise a præmunire is incurred; therefore there needs no citation of opposers, nor are they to be heard if they offer"; and Sir John Lambe's view (5) is to the same effect. The question is dealt with more elaborately in the judgments of Dr. Lushington, Dr. Burnaby, and Sir John Dodson in the *Hampden Case* (1), and the division of opinion among the judges in the Queen's Bench makes those three judgments of very high authority. To these may be added the opinion of Sir Henry Martyn (Dean of Arches in 1628) in the *Mountague Case.* (6) The statute 25 Hen. 8, c. 20, was passed for the express purpose of settling the practice in these cases, and its language is mandatory; the archbishop is commanded to confirm, and may be punished if he does not confirm within a limited time. The authority of Italian canonists cannot be invoked in order to control and defeat the operation of a statute by the authority of canons which are not part of the law of the land. An appeal to contemporaneous exposition is fatal to the contention of the prosecution. The passage relied upon in the Bishops' Book appears, upon careful examination, to deal only with the institution of priests to incumbencies, and not with the confirmation of bishops at all; in any event it had disappeared six years later in the King's Book, where the exclusive authority of the King is expressly asserted. And Archbishop Cranmer (1) shews that many of the solemnities on appointments of high officers of state, including bishops, were not of necessity, but merely for purposes of good order.

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(1) 11 Q. B. 483; Jebb.

(2) 4 Inst. 337.

(3) 1 Hagg. Cons. 4, n.; Jebb, 227.

(4) Jebb, 145.

(5) Rothery's Precedents, p. xxvi.

(6) 6 State Trials (N.S.), 427–9, note (b).

The order of proceedings in the present case is almost identical with that in the *Hampden Case* (2) and in the *Exeter Case*. (3) In the former case, indeed, Dr. Lushington refused to hear any objections at all, whatever their nature.

[LORD ALVERSTONE C.J. He was there dealing with a specific matter which had been raised by the opposers; there is nothing to shew that he would not have entertained such an objection as that the person appearing for confirmation was not the person nominated by the Crown.]

No doubt in the *Exeter Case* (3) Sir Travers Twiss held that the opposers could object on that ground, or on the ground that the election was defective in form; but he added that they could not appear for the purpose of in any way having those objections entertained with a view to confirmation being refused.

[WRIGHT J. In *Evans* v. *Ascuithe* (4) it is said that the purpose of the objection is to examine the election and the ability of the person.]

Yes; it may be that the archbishop may inform himself as to any defect in the election, or as to certain of the personal disqualifications imposed by the canon law. In the present case the congé d'élire and the letters missive were in the usual form, and it is suggested that although the letters missive declare the character and qualifications of the bishop-elect, yet the archbishop, who is bound to confirm within a limited time after election, may consider whether the Crown was right in attributing those qualities to the bishop-elect. Two changes only have been made by the vicar-general in the present proceedings: first, they were removed from a consecrated building (the church of St. Mary-le-Bow) to the Church House, the right to do which is not challenged; and, secondly, notice was given to persons wishing to appear to state in chambers the nature of the objections that they intended to make when the actual ceremony of confirmation took place; as to this, whether confirmation takes place in a court, or whether it is merely a ministerial matter, the archbishop through his vicar-general could equally take such a step. When the objections were stated in chambers, they were found to be objections only to doctrine, specifying no particular heresy on the part of the bishop-elect and disclosing no ecclesiastical offence; they are merely suggestions that he is not a proper person to be appointed; the vicar-general ascertained that there was no objection to the processum electionis or on the ground of any personal disqualification, and then proceeded to confirmation, as had been done in the *Hampden Case* (1) and the *Exeter Case*. (2) It was impossible that the suggested inquiry could be entertained by the archbishop; the bishop-elect was not a party to the proceedings, and there was no machinery or procedure by which the charges could have been investigated; no adjudication could have been made upon them, and the vicar-general must have proceeded to confirmation: see the judgment of Wightman J. in *Reg.* v. *Bishop of Chichester*. (3) Confirmation is not a mere formality; it is a necessary proceeding by which the bishop-elect becomes entitled to the spiritualities appertaining to his office; matters of doctrine are safeguarded by the careful and deliberate choice of the Crown and the very real and solemn ceremony of consecration. The course adopted by the vicar-general was not only in accordance with the precedents and the opinion of the civilians ever since the passing of 25 Hen. 8, c. 20; it was also entirely in accordance with the citation, on which alone rests the right of opposers to come in and be heard, and in which they are told that the confirmation will be proceeded with.

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(1) Remains and Letters (Parker Society).

(2) 11 Q. B. 483: Jebb.

(3) Phillimore's Ecclesiastical Law (2nd ed.), vol. i. p. 45; *The Times*, Dec. 9, 1869.

(4) (1628) W. Jones, 158; Palm. 457.

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(1) 11 Q. B. 483; Jebb.

(2) Phillimore's Ecclesiastical Law (2nd ed.), vol. i. p. 45; *The Times*, Dec. 9, 1869.

(3) 29 L. J. (Q.B.) 23.

G. J. Talbot (*Rayner Goddard* with him), for the bishop-elect.

Haldane, K.C., *Bramwell Davis, K.C.*, and *Whitehead*, for Captain Cobham, in support of the rule. The meaning and effect of 25 Hen. 8, c. 20, depend on three things: the position of things at the passing of that statute, the interpretation to be placed upon its language, having regard to that state of things, and the light cast upon its construction by subsequent usage. The office of confirmation is inseparably connected with that of consecration, and from the earliest times the placing of a bishop has been in the hands of the temporal power, while the making of a bishop has been in those of the spiritual power; the argument for the Crown would make confirmation and consecration alike empty forms. It is a fallacy to liken the proceedings in confirmation to the forms and proceedings of a court; the archbishop is not in the position of an ordinary court and his functions are not limited by ecclesiastical law, but he has a discretion which he is bound to execute reasonably with regard to the existing rules of the Church.

Originally the choice of a bishop was the free choice of the inhabitants of the see or diocese, but as early as the fifth century it is laid down in the Novels of Justinian (1) that it is the duty of the ecclesiastical authority to see that a proper selection has been made. In this country in Anglo-Saxon times the choice was at first that of the clergy and laity combined, then that of the clergy only, which gradually (and at first irregularly) became controlled by the King. At a later date the decrees of the Lateran councils regulated, even in this country, the appointment to the office of bishop, and it is apparent from various decretals (2) that a bishop-elect was to be examined touching, not any isolated or particular or defined or exclusive matters of qualification, but touching a number of points upon which the Church required to be satisfied. In England, as early as Anglo-Saxon times, the sovereign claimed control over the election of bishops, as appears from Lingard's History of the Antiquities of the Anglo-Saxon Church (1); this control, at first irregular in its nature, was afterwards exercised in accordance with recognised custom. It existed side by side with the jurisdiction of the supreme spiritual power to test and examine the bishop-elect in order both to his confirmation and consecration. This led to disputes between the spiritual and temporal powers, and was the leading cause of the quarrel between William Rufus and Anselm: see Short's History of the Church of England, pp. 34, 35 (2); Ayliffe's Parergon, 126; Johnson's Ecclesiastical Laws, vol. ii. 1107, tit. "Compromise of Investitures." The result of these authorities is that at that time both confirmation and consecration were in the discretion of the Church.

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(1) Novel 123.

(2) Decretal of Third Lateran Council, A.D. 1179; Decretal of Council of Lyons, A.D. 1243, 1244.

The main ground relied upon by the Attorney-General was that after the year 1316 there was no instance of a contentious confirmation, that is, of an opposition to confirmation. But it is apparent from Stubbs' Ecclesiastical History, pp. 338–340 (3) that the reason was that there had been negotiations between the King and the pope which, subsequent to the date of the Statute of Provisors, terminated in an arrangement which precluded the raising of these questions; confirmation was in fact governed, not by the act of the King, but by the act of the pope, who had succeeded in drawing the whole matter to Rome. This state of things existed down to the date of the statute of 25 Hen. 8, c. 20, the object of which was to restore the normal state of things existing in 1316. The right of the King to exercise a control over the free choice of their bishop by the dean and chapter is of very early origin: the first recorded instance of a congé d'élire is in the case of the Bishopric of Ely in the first half of the thirteenth century. By 1316 the normal state of things was that there was interference by the sovereign in the election by the dean and chapter, but that confirmation and consecration were within the jurisdiction of the metropolitan of the province. The Decretum Gratiani, Distinctio 23, cap. 2 (1), shews the mode of examination of a bishop-elect; and this part of the canon law as it existed in the time of Henry VIII., not being repugnant to the law of the land or to the King's prerogative, is a part of the law of the land: Blackstone's Commentaries, vol. i. p. 83 (original edition). It is clear that in 1533 there was a normal ecclesiastical practice of such a kind that the word "confirmation" had then acquired a definite meaning; it is only for the purpose of establishing the existence of this practice that reference to the canon law is necessary. The state of affairs was that it was for the archbishop personally to decide questions as to confirmation, while the vicar-general could only hold a preliminary inquiry to see if any objections were taken.

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(1) Ed. 1845, vol. i. p. 80.

(2) Ed. 1857.

(3) Ed. 1880, vol. iii.

Looking at the state of things immediately preceding the passing of 25 Hen. 8, c. 20, it must be remembered that that statute followed on 23 Hen. 8, c. 20 (2), which was in so many words intended to restrain the payment of annates to the See of Rome; it was meant to cut down the interference of Rome, and confirms the theory that confirmation belonged of right to the metropolitan but had been usurped by Rome. The object of the statute was not to do away with the ceremony of consecration, but to provide that consecration should take place in England at the hands of the archbishop of the province; under colour of having the consecration at Rome, opportunity had been taken for the exaction, not only of the annates, but of large fees for the obtaining of bulls and palls. The same feature pervades the statute under construction—25 Hen. 8, c. 20. The congé d'élire had already become the well-recognised method by which the King controlled the election by the dean and chapter, and this statute did not attempt to alter the existing state of things as between the King and the Church generally; it aimed solely at cutting down the interference of Rome. The Attorney-General referred to eight cases where confirmation was dispensed with and consecration followed on nomination or election, but there is no case where consecration is dispensed with; and there must be before consecration a discretionary power of examination in the archbishop to be exercised, not arbitrarily, but according to fixed principles understood by the law of the Church as testing the fitness of the bishop-elect.

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(1) Jebb, 338; Corp. Jur. Can. (Richter's ed. Leipzig, 1879), vol. i. p. 78.

(2) Jebb, 31.

[LORD ALVERSTONE C.J. Do you say that in those cases where no confirmation is necessary there is a discretionary duty on the archbishop to examine before consecration with a view to seeing whether the bishop-elect is a proper person?]

Only so far as is prescribed by the Prayer Book; he need not examine him from other sources, for such an examination would not be part of the customary procedure. Both in the appointment of suffragan bishops under 26 Hen. 8, c. 14, and of Colonial bishops the archbishop presents the names of "two honest and discreet spiritual persons, being learned and of good conversation," to the King; in other words, he has a kind of discretion or right of selection. And the language of the preface to the service of the Ordering of Bishops, Priests, and Deacons in the Prayer Book, which was written by Archbishop Cranmer, supports the view of the archbishop's discretion; it recites that these offices "were evermore had in such reverend estimation, that no man might presume to execute any of them, except he were first called, tried, examined, and known to have such qualities as are requisite for the same," and concludes: "no man shall be accounted or taken to be a lawful bishop, priest or deacon in the Church of England, or suffered to execute any of the said functions except he be called, tried, examined, and admitted thereunto, according to the form hereafter following, or hath had formerly episcopal consecration, or ordination"; the provision that he is to be "tried" and "examined" strongly supports the view that the archbishop has a real discretion. Sect. 7 is important, because, if the view of the Crown is right, it exposes to the penalties of præmunire an archbishop who refuses to consecrate, however unfit the bishop-elect may be. The plain meaning of these two statutes taken together is that they were directed only to interference on the part of Rome, which was not the normal state of things in the Church in England.

[RIDLEY J. Sect. 3 deals with election, presentation, investment, and consecration. Can you suggest any reason for the omission of confirmation?]

The reason was the importance of the episcopal laying on of hands, and the constitution or preservation of the doctrine of the apostolic succession. Confirmation and consecration are very closely allied to one another; and confirmation was intended to furnish the archbishop with the fullest materials on which he could in any ordinary case proceed to consecration. By 25 Hen. 8, c. 20, confirmation, which was now for the first time definitely prescribed by the Legislature, was dispensed with in certain cases where the dean and chapter, who had to make the choice, failed in their duty. The provision exposing the archbishop to the penalties of præmunire on his failure to proceed to consecration must be read as meaning on his failure to do so without lawful excuse; in other words, to proceed to confirmation or consecration means to proceed to the office of confirmation or the office of consecration, and was not intended to alter the substance of that which was prescribed by the ancient usage of the Church.

Contemporaneous exposition is of great importance in such a matter: *Ridsdale* v. *Clifton.* (1) In the very year that the statute was passed, the King sent to Rome for the bulls for the confirmation of Cranmer (2), thereby acknowledging the power of the See of Rome to act as the spiritual tribunal of first instance in sanctioning the election. Then there is the contemporaneous exposition of the view of Archbishop Parker (3), elected in 1559, and presumably of Queen Elizabeth herself; at his consecration witnesses were summoned to prove the statement in the summary petition that he was "vir providus et discretus" (4), which shews that the ceremony of confirmation was one sufficiently substantial to necessitate the calling of witnesses, although objectors had been summoned and none had appeared.

(1) (1877) 2 P. D. 276, at p. 331.

(2) Jebb, 130; citing Burnet.

(3) Jebb, 56, 57.

(4) Jebb, 71, 72; Gibson's Codex, 111.

[LORD ALVERSTONE C.J. They seem to have been called to prove the identity of the archbishop elect.]

Parker's case is also important from the fact that far more than the statutory twenty days elapsed—the congé d'élire having been on July 18, the election on August 1, and the confirmation and consecration on the 9th and 17th December respectively. This supports the view that the archbishop is subject to præmunire only where the delay is without lawful excuse, which was the view taken by Coleridge J. and Patteson J. in the *Hampden Case*. (1) In substance the forms used in Parker's case and in the present are the same.

The view of the lawyers living comparatively near this period supports the opposers' construction of the statute. In *Evans* v. *Ascuithe* (2) the question was as to the validity of a lease granted by the Dean and Chapter of York after the election of the dean to the Bishopric of Bristol, but before confirmation; and although the two offices could not be held together, the lease was held to be valid, the substance of the decision being that until confirmation a man was not a bishop in the eye of the law, and, consequently, that a lease granted by him as head of the chapter was good, because he had not ceased to be entitled in law to his benefice. It is stated in the judgment (3) that the archbishop examines the election and the ability of the person, and on that he confirms him, and afterwards consecrates. In *Mountague's Case* (4) an objector, who was merely one of the public, was not refused a hearing, but was got rid of on the ground of informalities in his opposition; this shews that confirmation was in the time of Charles I. regarded as a matter of substance and not as a mere form. These cases are inconsistent with the view of the statute taken by the Crown, and the rule for a mandamus should be made absolute.

Danckwerts, *K.C.*, and *Morton Smith*, for Garbett. Reliance is placed on the arguments for the objectors in the *Hampden Case* (1), and upon the judgments of Coleridge J. and Patteson J.

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(1) 11 Q. B. 483; Jebb.

(2) W. Jones, 158; Palm. 457; Jebb, 146.

(3) W. Jones, at p. 160.

(4) Jebb, 45; Collier's Ecclesiastical History, vol. ii. p. 745.

In the present case the charges made by Garbett were ecclesiastically criminal, and the procedure was by exhibiting articles; the documents, in fact, delivered to the vicar-general were merely notices of the nature of the objections, which in due time would have taken the form of articles; articles cannot be delivered till after appearance: see the *Hampden Case.* (1) No interest is necessary in order to commence a suit in the Ecclesiastical Court by articles: *Fagg* v. *Lee.* (2)

Turning to the construction of 25 Hen. 8, c. 20, the Crown must make out three things: that the words are used in their ordinary popular meaning, that that meaning is that there must be confirmation without examination, and that the commands of the statute are imperative—all these points are traversed on behalf of the objectors. The provisions of 1 Edw. 6, c. 2 (3), throw some light on the question; it created an artificial state of things which put the King's nominee in the same position as if there had been a congé d'élire, election, and confirmation, recognising the fact that confirmation had previously been an essential, and not a mere formal, ceremony. The cases of bishoprics relied on by the Attorney-General are cases of temporary provisions for appointment of bishops until a dean and chapter has been provided, after which they are elected as other bishops, the ceremony of confirmation being part of the procedure. In bishoprics in foreign countries the selection rests with the ecclesiastical authority, and the Crown has to accept it. (4)

As to the position of the vicar-general. The proceedings before him are judicial; they are taken in the metropolitical Court of the archbishop before the archbishop himself or his vicar-general, who must permit the opposers to appear, and then bring in articles; it is then for the vicar-general to try the matter himself or to remit it to the archbishop. The letters patent to the present vicar-general shew that he has contentious jurisdiction.

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(1) 11 Q. B. 483; Jebb.

(2) (1874) L. R. 6 P. C. 38.

(3) See Gibson's Codex, i. 113; Constitution of Church of England, by Felix Makower, pp. 60, 61 (1895).

(4) See Phillimore's Ecclesiastical Law, ii. 1810.

[Lord Alverstone C.J. He is appointed official principal as well as vicar-general.]

From Ayliffe's Parergon, 92, it appears that the vicar-general has power to excommunicate a suffragan bishop. The regular form of citation to the Court of the archbishop is to appear before the archbishop himself or his vicar-general in spirituals, or some other competent judge: *Read* v. *Bishop of Lincoln* (1); *Bishop of St. David's* v. *Lucy* (2); and Sir H. Martyn said that there was a strict form in use in 1534 from which he did not swerve. (3) The citation to opposers in the present case gives a power of continuation and prorogation; such a power of adjournment shews that confirmation is not a mere form, for in that case a power to adjourn would be unnecessary. The whole procedure takes a judicial form; it is in a known Court, that of the archbishop or vicar-general; the latter sits as a judge and makes his decree as a judge, and makes it in a proper ecclesiastical form. It is only in the case of a judicial citation that a person can be declared contumacious. A notary public and the principal registrar are present at confirmation, and this fact marks it as a judicial proceeding. As soon as the decree of confirmation is pronounced, the bishop elect becomes a bishop complete, and is then subject to trial by the archbishop; if, therefore, he is heretical, the archbishop must, if the argument for the Crown is right, first make him a bishop, and then bring him to trial or depose him.

The whole object of 23 Hen. 8, c. 20, was to free the English episcopacy from the exactions of Rome; it was a tentative Act, and as after two years its object was not accomplished, the further statute 25 Hen. 8, c. 20, was passed in order to abolish the interference of the pope in the consecration and making of bishops, and to abolish applications for bulls to that end. That Act is not an absolute statutory command to the archbishop to do the things mentioned in it, but only a command to do them without getting a bull from Rome. The provisions as to the penalties of præmunire necessarily imply that the dean and chapter or archbishop are to be subject to them if they delay beyond the limited time without lawful excuse. The archbishop is to confirm the election, and to invest and consecrate; the meaning of the last two words can only be ascertained by a reference to ecclesiastical law, and the meaning of confirmation should be ascertained in the same manner. The word does not mean merely to certify without any examination; no dictionary gives such a meaning; the various definitions of the word imply something in the nature of mental approval. That confirmation is a judicial act is abundantly clear from the canonists, and should also be inferred from the forms in use; judicial forms which have been used for three centuries should not be thrown over on the ground that they are a mere fiction. Gibson's Codex, p. 110 (1), shews that to understand the nature of confirmation one must look at the proceedings of the ecclesiastical tribunal which deals with it.

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(1) (1889) 14 P. D. 88, at pp. 123, 127.

(2) (1699) Salk. 134; 1 Ld. Raym. 539.

(3) 6 State Trials (N.S.), 427, note (b).

[Lord Alverstone C.J. Is there any portion of those notes in Gibson's Codex which points to opposers being heard, or to the proceedings being contentious?]

The citation, and the statement that there must necessarily be a citation, and also the fact that the archbishop required proof. The proceedings took the form of a suit. The examination of witnesses, as in Archbishop Parker's case, shews that it was done for the purpose of informing the mind of the archbishop; it was a real and serious proof. The passage already cited in *Evans* v. *Ascuithe* (2) effectually shews that there was an examination both as to the election and as to the ability of the person presented; and see also Viner's Abridgment, tit. Evesque; Selden's opinion at 6 St. Tr. 427. Long usage is an element to be considered in construing a statute: *Lord Fermoy's Case* (3); *Stephen* v. *Gosnold* (4); Kent's Commentaries, vol. i. Part III. p. 465; *Montrose Peerage Case* (5); *Justices of Dunbar* v. *Duchess of Roxburghe.* (6) The opinion of Sir James Marriott, cited by the Attorney-General, is of no authority; it is a mere opinion entered in a note-book which he made while sitting in the library of his college; the authority of Burn's Ecclesiastical Law (1) is to the contrary effect.

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(1) 2nd. Ed.

(2) Palm. 457; W. Jones, 158, at p. 160.

(3) (1856) 5 H. L. C. 747.

(4) (1672) Vaugh. at p. 169.

(5) (1853) 1 Macq. at p. 406.

(6) (1835) 3 Cl. & F. at p. 354.

The vicar-general had no power to sit in chambers and rule the opposers out.

[LORD ALVERSTONE C.J. That is not ground for a mandamus.]

The second calling or citation of opposers by the apparitor-general was omitted; this is a proceeding of great importance, coming as it does after the dean and chapter have asked to be allowed to prove the bishop elect to be a fit and proper person, and there was no power in the vicar-general to omit it.

Sir R. B. Finlay, A.-G., in reply. If the nominee of the Crown to a bishopric may be rejected by the archbishop on any ground that would be available in the case of a presentment to an ordinary living, the Crown would be in a worse position than an ordinary patron, who has always had his remedy by quare impedit, and now has a remedy under the Benefices Act, 1898; the Crown has no such right. As to the position of the vicar-general, Oughton's Ordo, tit. 5. p. 17, shews a practice down to 1597 of the judge of the Court of Audience being vicar-general. The canon of construction adopted in *Ridsdale* v. *Clifton* (2) strongly supports the argument for the Crown. *Evans* v. *Ascuithe* (3), on which reliance is placed, merely decides that a licence in commendam to hold the Deanery of York with the Bishopric of Bristol, granted after election, but before confirmation, was not too late, and the judges expressly disclaimed any intention of deciding as to the Royal prerogative. As to the writs under 3 Hen. 5, given in Rymer's Fœdera, no question ever arose as to the archbishop's duties under that statute, which was only in force two years; the Act itself is far less stringent than 25 Hen. 8, c. 20. The note at 6 St. Tr. 427 is merely a record of a debate in the House of Commons, not a decision of a Court.

Cur. adv. vult.

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(1) Vol. i. p. 198.

(2) 2 P. D. 276, at p. 331.

(3) W. Jones, 158; Palm. 457.

Feb. 10. The following written judgments were delivered:—

LORD ALVERSTONE C.J. These were two rules in the same terms moved on behalf of two gentlemen of the names of Cobham and Garbett calling on his Grace the Archbishop of Canterbury and Charles Alfred Cripps, Esq., K.C., Vicar-General, "to shew cause why a writ of mandamus should not issue directed to them commanding them, or one of them, at a Court to be therefore duly holden in the cause or business or matter of the confirmation of the election of the Rev. Charles Gore, D.D., to the Bishopric of Worcester, to permit and admit to appear in due form of law the said Alexander William Cobham, chairman of the Church Association, to oppose the said confirmation of the said election of the said Rev. Charles Gore, D.D., and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof." Cause was shewn against these rules on behalf of the Crown and on behalf of the archbishop and vicar-general.

It appeared from the affidavits that the Rev. Canon Gore having been duly nominated in letters missive from His Majesty the King was elected Bishop of Worcester by the Dean and Chapter of Worcester acting under Royal licence, and was then presented for confirmation to the Archbishop. On January 16 the Archbishop of Canterbury had issued a citation substantially in the form which has for many years been used on such occasions, but to which was added the following note or addition: "Persons claiming to be heard as objectors must deliver notice of their objections in writing at the office of the Provincial Registry, No. 3, Creed Lane, Ludgate Hill, before 4 P.M. on Tuesday, January 21 inst. No objection will be considered unless such written statement has been delivered. The vicar-general will sit in chambers at Committee Room No. 2, at the said Church House, at 10 A.M. on Wednesday, the 22nd inst., to consider any objections which may have been delivered, and no objector who does not appear in chambers and establish his right to appear and be heard can appear or be heard during the business of confirmation." In accordance with the direction contained in such note certain persons, acting in the same interest as Captain Cobham, appeared in chambers, and handed in to the vicar-general printed objections, which were verified by affidavit, and Mr. Garbett and certain other gentlemen handed in certain other objections in writing, to which it is not necessary to refer in detail. It is sufficient to say that the objections handed in on behalf of Mr. Garbett alleged that the Rev. Canon Gore, the bishop-elect, had committed ecclesiastical offences, and had published false doctrine, and had thereby contravened the articles of religion, and that he was by reason of such publication unfit to be entrusted with the care and superintendence of a diocese. The other set of objections alleged among other things that Canon Gore was not a prudent and discreet man, and not at all a fit and proper person to fill the office of bishop, by reason of certain passages in his published works, and, further, that he had been a member of certain societies mentioned in the objections. The learned vicar-general, after considering the nature of the objections, declined to hear any of the opponents in support of them, and, after taking the names of the objectors, gave his decision that they were not objections which he could entertain. He gave reasons for arriving at that decision, which were set out in the shorthand notes verified by affidavit and read before us.

The question raised is, no doubt, one of extreme importance. We have been greatly assisted by the arguments of the learned counsel who have appeared before us on both sides, and also by the full report of the arguments which took place in the case of *Reg.* v. *Archbishop of Canterbury.* (1) Without that assistance it would have been impossible for me to prepare my judgment within so short a time after the argument; but I have endeavoured to prepare the reasons for the judgment which I am about to give as quickly as possible, because we are aware that it is very important in the interests of the diocese that there should be no delay in dealing with the matter.

One main ground of the contention of the learned counsel in support of the rule was that the vicar-general was sitting as a Court to which opposers had been summoned by virtue of the citation of January 16, and that they were entitled, in accordance with the terms of the citation, to state any ground of opposition to the election or confirmation of Canon Gore, and therefore to raise by way of opposition the charges of ecclesiastical offences and the other objections referred to in the notices. The case was in the first instance launched when the rule was moved as a claim for a mandamus to compel a Court of limited jurisdiction to exercise jurisdiction which it was bound to exercise at the instance of the parties who demanded its exercise. I am of opinion that the rules could only be made absolute if that position can be maintained, and that unless it is made out no mandamus ought to issue. It was on this basis that the case was considered by the judges of the Queen's Bench in *Reg.* v. *Archbishop of Canterbury* (1): see the judgment of Coleridge J. at p. 577 and the judgment of Patteson J. at p. 633 of the report in 11 Q. B., and the authorities upon the point which are collected in Tapping on Mandamus. pp. 230 et seq. This point will be found of considerable importance in view of an alternative contention urged on behalf of his client by Mr. Haldane, to which I will refer later, to the effect that the Court ought also to grant a mandamus to compel the Archbishop of Canterbury to consider these particular objections in order to inform his mind as to whether or not Canon Gore was a fit person to be confirmed and consecrated as a bishop.

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(1) 11 Q. B. 483; Jebb's Report of the *Hampden Case.*

Dealing with the ground first mentioned, the claim thus set up is a claim that any member of the public, or at least any inhabitant of the diocese interested, who desires to oppose the confirmation and consecration of any person who has been elected a bishop, may appear in answer to the citation of the archbishop, and call upon the vicar-general or the archbishop to hear and decide alleged charges of heresy, false doctrine, or other ecclesiastical offences, or, secondly, to inquire into and give judgment upon general objections to the fitness for the episcopal office of the person nominated by the Crown, duly elected by the dean and chapter, and presented to the archbishop for confirmation. It was not disputed by the learned counsel who supported the rules that, in order to make good this first contention, we must hold that the act of confirmation by the archbishop or the vicar-general is the act of a Court having jurisdiction to hear and determine such questions at the instance of the persons raising them. The question primarily depends upon the true construction of the Act 25 Hen. 8, c. 20. Briefly summarised, that Act by s. 4 enables the King on every avoidance of an archbishopric or bishopric to grant to the dean and chapter a licence to proceed to the election of a person named in a letter missive sent by the King, and provides that the dean and chapter shall elect and choose the person so named. By s. 5 it provides that, if the dean and chapter elect and choose such person, then their election shall stand good and effectual to all intents; and further that the King may by letters patent under the Great Seal signify the election to the archbishop, and require and command him to confirm the election, and to invest and consecrate the person so elected. Sect. 4 contains a further provision that, if the dean and chapter defer or delay the election for more than twelve days, the King may, by letters patent, nominate and present to the said office such person as he thinks able and convenient. The 7th section provides that the failure of the dean and chapter to elect in accordance with the King's licence and letters missive, or the refusal of the archbishop to confirm, invest, and consecrate such person within twenty days after the King's letters patent have come to his hands, shall involve the one or the other in the dangers and penalties of the Statute of Præmunire.

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(1) 11 Q. B. 483; Jebb's Report of the *Hampden Case*.

Upon the construction of this statute, speaking for myself, I can add little if anything to the judgment of Erle J., in which I entirely concur. There is in the statute no mention of any examination or inquiry by the archbishop, but he is directed to confirm the election within a period of twenty days; nor does the statute, on the face of it, in terms contemplate or directly or indirectly suggest that the archbishop can in any way question the fitness of the person nominated by the Crown, unless such power is involved in the use of the word "confirm." If the archbishop had such a general right, the position of the

Crown would be extraordinary, and, as was pointed out by the Attorney-General in reply, far worse than that of the patron of an ordinary living in relation to his patronage. Without now enlarging upon a matter which from some aspects is of considerable importance, I may point out that bishoprics have always had largely the character of donatives; and, if the archbishop possessed the right to veto the nominee of the Crown, I know of no legal proceeding by which the King could enforce his rights as patron. Of course, I am not referring to præmunire, which is a punishment to the archbishop. We have nothing to do on this application with any question of refusal or unwillingness on the part of an archbishop executing his high office to confirm or consecrate; the archbishop would do so upon his own responsibility, and would incur the risk of præmunire contemplated by the statute. No question was, or could be, raised before us upon the argument of these rules as to the consequences of such refusal. I mention this because, both in the argument of Bishop Hampden's case and on the argument before us, what appear to me to be extravagant suggestions were made that the archbishop might be compelled to confirm as bishop a man who was not a priest in holy orders, a person under the age of thirty, a Jew or Turk, a pronounced infidel, or one having some other obvious disqualification, and there is a strong passage in the judgment of Coleridge J. (1) to the same effect. We are not dealing with any such case, and, in my opinion, these considerations do not assist us. We have only to read the history of the last 150 years, or of our own time, to know that the choice of persons to fill the high office of a bishop is a matter of most anxious consideration by the Crown, and that advice is given by those who are most competent to guide in the selection of fit persons. We have in this case to deal with the claim of those on behalf of whom these rules were moved to appear upon this citation before the archbishop or his vicar-general, and to demand a judicial decision upon the objections which they have raised. I have not omitted to notice the limit of twenty days fixed by s. 7. I am rather inclined to agree with the argument presented by Mr. Danckwerts

(1) 11 Q. B. at p. 604; Jebb, 465.

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and other learned counsel that this limit should not be considered absolutely binding if an objection was lawfully raised which would lead the archbishop to refuse or postpone confirmation. But, upon the other hand, a set limit of days does seem wholly inconsistent with the idea that the statute referred to a recognised practice whereby opponents might raise questions which might not possibly be determined except by protracted litigation.

To meet the plain objection which arises upon the words of the statute, it was urged that the words "confirm the said election" in s. 5, and "confirm" in s. 7, refer to a practice of confirmation alleged to be well known, which was said to have existed in normal circumstances in the Church of England at some period prior to the passing of the Act, a practice under which it was contended that there was a duty on the part of the archbishop before confirming any person, although such person had been named by the King and duly elected by the dean and chapter, to inquire at the stage of confirmation as to his fitness, having regard to the qualifications of a bishop as laid down in the canons of the Church; and that, as a consequence, persons who were of opinion that the person named was not fit to be a bishop would be entitled to appear before the archbishop and be heard. It was not suggested that this practice was actually existing in the Church of England at the date of the passing of 25 Hen. 8, c. 20; on the contrary, Mr. Haldane admitted, and made it a part of his argument, that what he called the normal practice had been interrupted from 1316 up to 1533—a period of upwards of 200 years. But he contended strenuously that, prior to 1316, the practice at any rate of examination by the bishop had taken place under what he called the normal state of things, and that the words "and confirm" used in ss. 5 and 7 were meant to refer to that pre-existing practice, involving, as he said, the right of opposers to appear before the archbishop and raise objections. It was also contended that the forms which were used shortly after the passing of the Act, and which have continued in use substantially in the same form from that time down to the present—a period of nearly 370 years—must have been intended to recognise the right of the opposers to appear, to be heard, and demand judicial investigation.

If the evidence supported the contention that there was at the time of the passing of the Act such a practice, it would have been necessary to consider more closely the true effect of the words in s. 5 of the Act, "their election shall stand good and effectual to all intents," and, further, whether the continuance of any such practice was consistent with the express provisions of the statute. I must not be thought to express any opinion that, even if such practice had been established, persons could have claimed the benefit of it, having regard to the clear language of the statute. But, after the most careful consideration of the many matters, historical and legal, which have been brought before us, I am clearly of opinion that there is no evidence of the existence of any such established practice prior to the passing of the statute, and that the forms, which, as I have said, have been used without alteration from that time to the present, were not intended to refer to or to revive any practice of the kind. The uniform practice in usage since the year 1533 is practically conclusive against the contention that it is possible to construe the statute as referring to any such practice or right. It is absolutely essential to keep clearly in view the distinction between the state of things in the Church when bishops were really elected by some electoral body, and when the metropolitan had, as such, the responsibility of inquiring into and confirming the choice of the electors after that choice had been made. From the earliest days of the Church it has no doubt been recognised that a bishop should possess certain qualifications. They are to be found in many ancient ecclesiastical works, and were in great part based originally upon the Epistles of St. Paul.

Speaking of the foreign canon law, I think it is established that from very early times, when the choice of bishops was by actual election, there was inquiry, and occasionally examination by a superior authority—not infrequently the metropolitan—as to the qualifications of the person elected: see, among other authorities, the decretum of Pope Nicholas (Corpus Juris Canonici, Pt. I., p. 79, Richter's edition, 1879), which, I think, refers to Pope Nicholas II., who lived about 1058, and which was read to us by Mr. Haldane. So far as the foreign canon law is concerned, and the practice of the early Church, I think that substantially the same directions could be found at a very much earlier date; but I need scarcely say that, whatever may be the view adopted when any question arises in the Ecclesiastical Court, the foreign canon law, unless accepted in this country and thereby having become English canon law, does not form part of that law of England which we are administering to-day. The work of Lancelottus, to which reference was made both in the argument before us and in *Hampden's Case* (1), appears to me to be treating of the qualification of bishops and the examination of bishops-designate according to the foreign canon law, and not to be treating of the practice or order of confirmation in England, either before or after the statute; and I understand the reference in the judgment in *Evans* v. *Ascuithe* (2) to be a reference to him as a writer in that capacity. (3)

Turning now to the evidence before us of the practice in England prior to the statute and during the period suggested by Mr. Haldane as being the normal period—namely, prior to 1316—we were referred to the cases taken from Wharton's Anglia Sacra mentioned in the argument of Mr. Badeley in the *Hampden Case*. (4) None others were cited to us on the argument of this case, and, having regard to the great learning of the counsel who argued *Hampden's Case* (1), I should doubt whether any can be found. I am not in a position to add to them from my own knowledge or research. I have carefully examined in the Anglia Sacra the cases therein cited. All except one, that of Wakeryng, occurred between 1189 and 1316. They do seem to me to establish that during that period in some instances a day was given for opposers to appear: see the case of Rochester in 1316 (Anglia Sacra, 357); that in some cases the archbishop did decline to confirm the election on grounds based upon the canon law: see the case of Winchester in 1274 (Anglia Sacra, 315); and in some cases there was an appeal to Rome: see the cases of Ely in 1256 (Anglia Sacra, 637), Worcester in 1303 (Anglia Sacra, 531), and Ely in 1310 (Anglia Sacra, 640); and that in some cases there was an examination as to competence and doctrine before confirmation: see the cases of Durham in 1213 (Anglia Sacra, 735), and Rochester, 1227 (Anglia Sacra, 348). The only case later than 1316 which has been mentioned to us was that of Wakeryng, Bishop of Norwich, in 1416 (Anglia Sacra, 417), which does not assist the argument one way or the other. Beyond the above points, however, nothing can be gathered from the particulars given of the character of the objections, if any, raised by the opposers. It is, however, most important to note that, as far as I can gather from the statement in Anglia Sacra, in every one of these cases prior to 1316 there had been a real election either by the dean and chapter or by the prior and convent, so that they relate to a period when there was a real election to be confirmed. It is to this period—namely, the beginning of the thirteenth century, 1227—that the Legatine Constitutions of Otho and Othobon refer. They no doubt express the English canon law, but they have no reference to the actual state of things at the time of the passing of the statute, or for many years before. But from about the year 1316 down to the passing of the statute in 1533, a period of over 200 years, an entirely different state of things seems to have prevailed. At one time the popes were insisting upon the right not only to confirm, but to select; at another the Crown was resisting the papal claims. Sometimes the struggle would appear to have been between the pope on the one side and the metropolitan or the electing corporation, be it dean and chapter or prior and convent, on the other. Confirmations at times took place at Rome, at times in England under bulls from the pope, and during the last fifty years immediately preceding the statute some authorities state that the King had successfully defended his claim to nominate independently of any interference by the pope: see Green's History of the English People, and Stubbs' Constitutional History. In my opinion, during a period of more than 200 years prior to 1533 there was no recognised practice at all; but it is sufficient to say that there is no evidence of any such normal practice as that which was contended for by the counsel who supported the rules, and that, therefore, it is, in my opinion, impossible to say that in using the word "confirm" the statute was referring to a procedure well known and understood at the time in any such sense as the argument of the applicants assumes.

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(1) 11 Q. B. 483; Jebb.

(2) W. Jones, 158; Palm. 457.

(3) Palm. at p. 472.

(4) Jebb, 345–9.

Before passing to other considerations I must notice one other argument. It was said that "confirm" must be used with reference to the canon law, and that inasmuch as by the ancient foreign canon law a bishop had to possess these qualifications, and it was the duty of the archbishop before consecrating a bishop to be satisfied that he possessed them, to that extent the canon law was recognised by and incorporated with the statute. I am wholly unable to assent to this line of argument. I need not cite authority to shew that it is well established that the foreign canon law only forms part of the law of England in so far as it has been adopted into the English common law, ecclesiastical or civil, or recognised by statute; and, unless it can be contended that by the law of England, apart from the foreign canon law, the word "confirm" used in the statute 25 Hen. 8, c. 20, imported this duty on the part of the archbishop and the correlative right of opposers, the foreign canon law cannot, in my opinion, be appealed to for the purpose of establishing that any such duty or right existed.

If it could be successfully maintained that an examination of the fitness of a bishop-elect, to take place *at the stage of confirmation*, was at the date of the passing of the statute considered a necessary condition of the consecration and appointment of all bishops, the matter would stand on a very different footing. But, as was pointed out by the counsel for the Crown and the archbishop, and not disputed by the counsel who supported the rules, in a considerable number of instances no confirmation took place; and, as illustrative of this, it was stated by Mr. Dibdin in the course of his argument that at the present time out of upwards of 100 bishops of the Church of England not more than twenty-five would be elected subject to confirmation. That this was to a certain extent a state of things contemplated by the statute and existing at, and shortly after, its passing cannot be disputed. It is, in my opinion, very important to observe that in the case contemplated by the statute itself—namely, of an archbishop or bishop being nominated by the King by letters patent in default of election—no confirmation is to take place; the statute enacts that the person so nominated is to be invested and consecrated by the archbishop. Again, in the case of the bishops of the Irish Church under 2 Eliz. c. 4 (Ireland), no confirmation was necessary. It is not quite clear to me whether the bishops appointed under the statute of 31 Hen. 8, c. 9, are cases in point—at any rate except during the period between that date and the repeal of that statute by 1 Ph. & M. c. 8, when they came under the general law, and have been, I believe, so treated. I think it will be found *Evans* v. *Ascuithe* (1) did, at any rate, shew that Bristol, one of the sees established by the Act 31 Hen. 8, c. 9, was under the general law in the time of Charles I. I have not had time to ascertain whether there was any general law at the time of the passing of 31 Hen. 8, c. 9, which would put those sees under it; I am not quite sure about it. I do not stop to consider the case of Colonial and Indian bishops, or the appointment of Bishops of St. Albans under the statute of 1875, and Liverpool, Newcastle, Wakefield, and Southwell under the Act of 1878, because they are of a much later date; but the practically contemporary statutes to which I have referred shew that the confirmation of a bishop by an archbishop was not in all cases an essential step in the appointment of a bishop. In the case of bishops other than those elected by deans and chapters in obedience to congés d'élire objectors would have no opportunity of even raising, still less of obtaining a decision upon, their objections. I may here mention that the statute of 1 Edw. 6, c. 2, the preamble of which was cited by the Attorney-General and the later provisions of which were read by Mr. Danckwerts, also shews that confirmation was not regarded as a necessary or essential step in the case of every bishop. The answer attempted by the learned counsel who supported the rules was that many, if not all, of these cases were instances of appointments under direct statutory authority. But, if examination at the stage of confirmation is, or was at the date of the statute, regarded as a safeguard in the interests of the Church against the nomination of an unfit person, it is difficult to understand why it should be dispensed with in the case of nomination by letters patent or in any of the cases referred to.

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(1) W. Jones, 158; Palm. 457.

That the construction of the statute which I have expressed was the view taken by lawyers of eminence from an early date is not, I think, open to question. In Coke's 4th Inst., at p. 337, it is stated that the confirmation of bishops' elections is one of the matters pro formâ dealt with by the Court of Audience; and, although, I think, as pointed out by Dr. Bayford in his argument in the *Hampden Case* (1), it is incorrect to state that such proceedings took place in the Court of Audience, this does not affect the weight of the authority from the point from which I am considering the question; and s. 201, at p. 134 of Coke upon Littleton (notes by Hargrave) is in accordance with the same view. The same may be said of Gibson's Codex, a book of very high authority, in the notes to which the various stages of the act of confirmation and the formal documents there presented are carefully discussed. This book was published in 1761, long after the date of *Mountague's Case* (2), which occurred in 1628. It is extremely difficult to believe that so learned a writer, dealing so exhaustively with the subject, would have failed to notice such an important right as that now contended for by the opponents to the bishop's confirmation, had it existed.

The order of confirmation set out in Oughton, vol. i. pp. 482–487 (3), is another authority in which, if the charges and objections raised by opposers were intended to be judicially examined, one would certainly have expected to find more reference to the procedure. We have not been referred to any text-book or authority, legal, historical, or ecclesiastical, contemporaneous or otherwise, which asserts that the opposers had the right to call upon the archbishop at the stage of confirmation to

(1) 11 Q. B. 483; Jebb.

(2) 6 State Trials (N.S.), 427, note (b).

(3) Jebb, 222.

entertain charges of ecclesiastical offences brought against the bishop-elect. The expressions "confirm the election," "examine the election," and "the person elected" do occur in some text-books; and I will consider how far they support the contention; but I am at the moment dealing with the absence of any direct authority for the claim of the applicants. It was suggested that the passage in Ayliffe's Parergon, at p. 245, supported this contention. The words are: "In granting confirmation all such persons ought to be first cited who have opposed the election; and these ought to be cited nominatim, if the election was made by part of the electors: But if the election was made unanimously and concorditer then all such persons ought to be cited in general who may or will object anything against such election, to appear at a certain day and place, when the confirmation is to be performed, in order to shew cause of their disapproving of the election and to impeach the confirmation thereof." But in my opinion that passage refers to the confirmation of elections as such—that is to say, an investigation as to the validity of an election—and does not do more than state a general proposition relating to all canonical elections, that persons opposing may allege that the election was irregular and that the person submitted for confirmation was not duly elected having regard to all the preliminary proceedings. The chapter of the work in which one would have expected to find that opposers had the right to call upon the archbishop to hear and determine objections to the bishop-elect at the stage of confirmation would be that commencing on p. 118, entitled, "Of a Bishop, his rise, power, and office in the Church." At pp. 127–129 all proceedings strictly in accordance with the statutes are duly set out, and reference is made in the earlier part of the chapter to the historical disputes between the King and the pope, to which we have been referred. It is difficult to believe that, if there had been a well-known and recognised practice, there would be no reference to it in that chapter or elsewhere in the book.

The only other authority upon which reliance was placed was *Evans* v. *Ascuithe* (1); the fuller report of this case is in Palmer, p. 457, in Norman-French. The two points decided in that case seem to me to have been those mentioned by the Attorney-General in his reply on behalf of the Crown—namely, as to the sufficiency of the original licence and whether the licence to hold the Deanery of York was good. But in the course of the argument some passages were referred to upon which reliance was placed by the counsel supporting the rule. Whitlock J. is reported to have said (1): "Without confirmation the elect can refuse, and for that reason there is before the confirmation a citation of opposers to this day." And the Chief Justice and Doddridge J. said (2): "The bishop has no more in England by election than the parson has by presentation." There is, however, in this case, as far as I can find, no discussion, still less decision, as to the rights of opposers or persons cited or the nature of the questions which may be raised. The passage in Burn's Ecclesiastical Law, vol. i. p. 206, which was relied upon by Mr. Bramwell Davis, does not appear to me to express any definite opinion of the learned writer. It is true that, speaking of opponents, he says: "But if any appear it seemeth that they shall be admitted to make their exceptions in due form of law"; but for this the only authority given is the reference to Collier's Ecclesiastical History, vol. ii. p. 745, and a commentary upon Mountague's case, which certainly does not seem to be warranted by any record of the proceedings as far as the materials that have been laid before us throw any light upon it. In the same way the opinion of Sir Robert Phillimore, at p. 42, of the second edition of his work, appears to be based entirely on a supposed implication to be drawn from the forms, by which, I think, he means the citation. The passage from 3 Salkeld, p. 71, where the words are, "whereupon the archbishop examines the election and the party and then confirms the election," carry the matter no further. It is important to observe that in none of these cases is the character of the objections which could be entertained considered. On the other hand, there is, in the first place, the opinion of Sir James Marriott, quoted by Sir John Jervis upon the argument of *Hampden's Case*. (3)

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(1) W. Jones, 158; Palm. 457.

(1) Palm. 457, at p. 474.

(2) Palm. at p. 475.

(3) Jebb, 145.

I have, unfortunately, not had the time or means to verify the quotation. It was said in argument only to be from the note-book of a student; if this be so, of course it would not be of great weight. I need only mention the opinions of Dr. Burnaby, Dr. Lushington, and Sir John Dodson in 1848, not only in the *Hampden Case* (1), but in that of Bishop Lee (2), and of Sir Travers Twiss in 1869 (3)—opinions which are in my judgment entitled to very considerable weight.

I must not omit to refer to a publication mentioned in the argument and cited in the note to Jebb's report at p. 138, though not referred to in the argument in the *Hampden Case* (1)—I mean an extract from a publication of the year 1537, entitled "The Institution of a Christian Man," commonly called the Bishop's Book, said to have been prepared by Cranmer, in which occurs the passage, "And unto the priests and bishops belongeth, by the authority of the Gospel, to approve and confirm the person which shall be, by the King's Highness, or the other patrons, so nominated, elected, and presented unto them to have the cure of these certain people within this certain parish or diocese, or else to reject him, as was said before, from the same for his demerits or unworthiness." Our attention has been called to a publication in the same volume, referred to as the King's Book, published in 1543, six years later, in which the same subject is dealt with but the passage quoted does not appear, nor anything to the same effect. The passage from "The Institution of a Christian Man" was not, so far as I can see, referred to at any part of the argument in *Hampden's Case* (1), though I think the very learned counsel engaged in that case must have been acquainted with it. After careful consideration of the whole matter, I am clearly of opinion that the statements in the pamphlet referred to, "The Institution of a Christian Man," so far as they can be considered as having had authority, are superseded by the later book, "The Necessary Doctrine and Erudition." I would refer on this matter to the publication of the Parker

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(1) 11 Q. B. 483; Jebb.

(2) (1848) 5 N. of C., Supp. p. ix.

(3) Phillimore's Ecclesiastical Law, i. 45; *The Times*, Dec. 9, 1869.

Society, referred to in the argument of the Attorney-General and Sir E. Clarke: see also some valuable observations on these works by Sir Robert Phillimore in *Sheppard* v. *Bennett* (1)

The case of Bishop Mountague, which came before Dr. Rives in 1628, is the only case in which, so far as I know, any attempt was made to bring forward charges of ecclesiastical offences against the bishop-elect between the date of the statute and 1848—a period of upwards of 300 years. For the reasons given by Dr. Lushington in his judgment in the *Hampden Case* (2), and from what appears in the notes to *Reg.* v. *Archbishop of Canterbury* (3), I am of opinion that that case cannot be regarded as any authority in favour of the applicants. I can find no authority for the passage in Burn's Ecclesiastical Law to the effect that Dr. Rives admitted that the opposition was good and valid, had it been legally offered. Great reliance was placed in the argument of Mr. Haldane and Mr. Danckwerts upon the preface in the Prayer Book to the making, ordaining, and consecrating of bishops, priests, and deacons, in which it is stated that no man may presume to execute any of the offices except he be first called, tried, examined, and known to have such qualities as are requisite for the same. This form, said to have been approved by Cranmer, has, I believe, been retained in the Prayer Book ever since the Reformation; but it is only necessary to read the next sentence in the preface to shew that it refers not to any examination at the stage of confirmation, or even prior to nomination by letters missive or the King's letters patent, because the words are distinct that no man shall be taken to be a lawful bishop " except he be called, tried, examined, and admitted thereunto according to the form hereafter following "; and I am not aware of any authority for the suggestion that the words in the preface on which so much reliance was placed by Mr. Haldane refer to anything except the very solemn service of consecration in which the archbishop is directed to put to the bishop-elect eight questions, which must be, and I have no doubt are, answered always by the bishop-elect upon his conscience. These questions replaced the questions previously required to be put to the bishop on consecration by the Sarum Missal, which dates, I believe, from the twelfth century. In this connection the terms of the 36th article of religion are not unimportant. The reference to this preface does not appear to me in any way to support the claim of the opponents to raise, and ask for judicial determination of, their objections at the stage of confirmation.

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(1) (1870) L. R. 3 A. & E. 167, at p. 184.

(2) Jebb, 59.

(3) 6 State Trials (N.S.), 427, note (b).

I pass now to consider the other main ground upon which it was attempted to support the rules nisi. It was said that the forms in use for the purpose of election and confirmation under the statute are in all material parts substantially the same as those which were used immediately after the passing of the statute. They contain a citation to opposers, all and singular, whoever such there be, especial or in general, that they appear before the vicar-general at a time and place fixed, to say against, except to, or oppose the said election, the form thereof, or the person elected, if they think themselves concerned, in due course of law. It was strenuously contended that these words must be taken to refer to some known existing practice whereby opposers had the right to appear and raise any objections, including charges of ecclesiastical offences, against the bishop-elect on any grounds on which they thought fit to allege that the bishop-elect was not a fit person. If the forms themselves were consistent only with this contention, it would no doubt raise an argument which would make it difficult to explain the practice which has prevailed ever since the passing of the Act; but, in my opinion, when the forms are carefully examined, they not only do not give any support to that argument but they tell against it. The Latin forms used on the occasion of the election of Archbishop Parker in the year 1559 are set out in Mr. Jebb's report of the *Hampden Case*. (1) We were informed by Mr. Hansell, one of the counsel appearing for the archbishop, that there exist in the registry at Lambeth the corresponding forms which were used in the case of the election of Bishop Goodrich in the year

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(1) Jebb, 56–74.

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1534—that is to say, practically contemporaneously with the statute. This statement is confirmed by a communication made to me since the argument by Mr. Morton Smith and Mr. Whitehead, counsel for the applicants. We understand that they may be taken to be substantially in the same form as those used on the occasion of the confirmation of Archbishop Parker. From a careful perusal of these forms it will be seen that, although persons are cited to appear and oppose if they think fit, they are distinctly told in more than one place that, whether they appear or not, nevertheless the confirmation will be proceeded with. It can, therefore, scarcely be urged that such forms are consistent with the right effectively to oppose or delay the confirmation by demanding an examination by the archbishop into charges which could only be dealt with after protracted and in some cases independent proceedings. I say independent, for a reason which will appear later on. This leads one to consider why these forms may have been used.

I need scarcely say that in former, and down to comparatively recent, times many old forms of summonses, proclamations, and public citations were in use which had no legal effect or operation, but still were kept up, and many old forms continued to be used long after they ceased to represent any real proceedings. It is unfortunate that we are unable to find any direct evidence as to the forms in use before the statute on the occasions on which the archbishops confirmed elections of bishops; but, if I may be allowed to hazard an opinion, I think that these forms were adopted from those which had been previously in use when elections really had to be inquired into, and that the reference in Ayliffe, to which I have already referred, as to the summoning of persons nominatim (p. 245) who had opposed the election, and in general where there had been no opposition, gives an indication of the genesis of the forms. We were referred by the Attorney-General to the practice on the confirmation of the election of deans. (1) The forms in use on these occasions are set out in Oughton, vol. ii. pp. 97 et seq., form 127. The commission to the vicar-general there directs him to approve, ratify, confirm, "ac si opus fuerit, ac res ita exigerit . . . ," annul and make void the election. The whole passage is important, and will repay examination in connection with the matter under discussion. The citation to opposers is set out at p. 99, and corresponds in many respects with the citation in use in the case of a bishop since 1535, and was published in a similar manner. The words are, "ad dictæ electionis confirmationem sive informationem prout justum fuerit procedemus." A comparison between these documents and those used on the occasion of the confirmation of a bishop after 1533 leads me to surmise that in all probability the view suggested by Mr. Bramwell Davis is correct—namely, that the forms are based on forms in use before the statute, having been originally framed to meet the practice existing as far back as the twelfth, or even the eleventh, century, in the case of the confirmation of elections generally, and that the important and fundamental differences which exist between the two forms subsequent to the statute may be due to the fact that old forms were properly adapted to the new state of things, the words "infirmandum, annullandum et cassandum" being omitted and the words "confirmatio" and "confirmare" alone retained; the public notices and citation of opposers being advisedly retained in case there should be any defect in the election, and also to preserve the public character of the proceedings. I have not been able to find in Oughton a corresponding form in the case of the confirmation of a bishop; the earlier chapter on the subject in his work I have already referred to.

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(1) Co. Litt. 95 a.

It must be remembered that ever since the statute, although, in my opinion, the proceedings by way of confirmation are formal in the sense that no general opposition can be raised at that stage to the fitness of the person elected, they were still a proceeding of a solemn character, in which, after the original licence, return of the election, letters patent, and other necessary steps were formally proved, confirmation by the archbishop or his representative, the vicar-general, followed. It seems to me not unnatural that the desire to maintain the dignity and public character of the act of confirmation of the election should have led to the retention of the ancient practice of summoning opposers to appear if they thought fit.

It was further contended that, because the proceedings include a summary petition which alleges the various steps, and contains, among other allegations, a statement (1) that the bishop-elect is a learned person and fulfils some of the qualifications which were from the earliest days considered necessary for a bishop, and that as this allegation in Parker's case was supported or formally proved by the evidence of two witnesses, who deposed to the various paragraphs of the summary petition, this shewed that the proceedings were in the nature of proceedings before a Court, and that opponents could traverse those allegations and be heard upon them, and the vicar-general might either pass judgment, or, if he thought fit, delay the confirmation, and refer the matter to the archbishop. It is to be noted, however, that these witnesses are called by the proctor for the dean and chapter; and, in my judgment, they are the formal proof of matters which has to be given, if I may borrow an expression from the Probate Court, in solemn form as laying the foundation for the confirmation. We were informed by Mr. Dibdin in the course of the argument that a summary petition is a petition which has evidence attached to it, but is not proved like a formal suit by libel or articles. It was urged by Mr. Bramwell Davis that because the writs, as set out in various volumes of Rymer's Fœdera, both before and after the statute, were in the same form, it must be assumed that the forms and practice in use immediately after the statute had been in use before. Even assuming this to be the case, I do not think it assists us materially in dealing with the question, because the writs, as I understand them, only direct the archbishop to confirm, but do not contain any words indicating that which was included or covered by the word "confirmation." I should, however, observe that an examination of the forms as set out in Parker's case shews that they could not have been in all respects the same as those before the statute, because reference is made in them to the statute. For the same reasons the statute

(1) Jebb, 64.

3 Hen. 5. (1418) (1) does not carry the matter any further, as it only refers in general terms to confirmation. We were pressed to say that the opinions of Bishop Fell (2) and of Dr. Nicholls's Commentary on the Book of Common Prayer (3) are only consistent with the view that there was a judicial inquiry into the qualifications of the bishop at the stage of confirmation. Having regard to the object with which these works were written, as indicated by Mr. Badeley in his argument in the *Hampden Case* (4), and looking to the language of the passages quoted themselves, they fall far short of supporting any such proposition, and cannot, in my opinion, be regarded as authorities upon the legal questions argued before us.

There is, in my opinion, another fundamental objection to the view that the proceedings of confirmation before the vicar-general are to be regarded as the proceedings of a Court, in which it is the duty of the vicar-general or the archbishop to adjudicate judicially upon the grounds of objections raised by the opponents. It is to this that I alluded when I referred earlier in my judgment to the necessity, if the arguments in support of the rules are correct, for independent legal proceedings to be taken at the stage of confirmation. This difficulty arises from the fact that, as far as I can see, the bishop-elect, though present at the confirmation and taking certain oaths there, is not a party to the proceedings in the proper sense of the word. The proceedings are initiated by the dean and chapter, and the citation is not addressed to the bishop-elect. If charges of ecclesiastical offences can at that stage, and as a part of those proceedings, be preferred against the bishop-elect, there is no trace of any machinery or practice for getting him before the Court for this purpose, or for dealing with the numerous questions of procedure or costs which are likely to arise. I put this difficulty to Mr. Danckwerts, who contended, as a part of his argument, that among the objections raised by the opposer for whom he appeared were charges of ecclesiastical offences. He replied that it would be the duty of the vicar-general to permit the opposer to appear and bring in articles, or, in effect, to commence formal criminal proceedings against the bishop-elect. I can see no trace of any such procedure, and it seems to me to be utterly foreign to the nature of the proceedings on confirmation, as it has existed in the United Kingdom for upwards of 600 years.

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(1) Jebb, 350; Rot. Parl. iv. 71.

(2) Jebb, 389.

(3) Jebb, 390.

(4) 11 Q. B. 483; Jebb.

When pressed with the difficulty which lay in the way of contending that the proceeding of the vicar-general was in the nature of a judicial proceeding by a Court of limited jurisdiction, and that a mandamus would go, at the instance of the party aggrieved, to compel the Court to exercise its jurisdiction, Mr. Haldane based his contention upon another ground—namely, that the archbishop had a duty to inform his mind before he confirmed the bishop-elect, and, that being so, he was bound to inquire into any objection raised by objectors and postpone the confirmation until he had so inquired; or, in other words, that he was bound to inform his mind upon any matters which the objectors chose to raise. I hope I have not done the argument injustice. I endeavoured to appreciate it, and have refreshed my memory by reference to the shorthand note. If the application for mandamus can only be based on the duty of the archbishop to inform his mind as to the fitness of the bishop-elect before he proceeds to confirm the election, or consecrate the person elected, it must fail. We cannot direct him to inform his mind in any particular way. The distinction between such a case and the case of refusal to exercise jurisdiction is well pointed out in the judgments of the Court of King's Bench in *Rex* v. *Archbishop of Canterbury* (1) and *Reg.* v. *Bishop of Chichester*. (2) As I pointed out at the beginning of my judgment, no question of that kind can possibly arise before us, and there is, as far as I know, no precedent for a mandamus being granted in such a case as that suggested by Mr. Haldane. If the claim of the opposers to appear, based upon their charges against the bishop of ecclesiastical offences, cannot be supported, I am clearly of opinion that the other vague allegations contained in the objections are not charges which any Ecclesiastical Court could entertain;

(1) (1812) 15 East, 117.

(2) 29 L. J. (Q.B.) 23.

nor can they be regarded as grounds which, in the view of the law already indicated, either the vicar-general or archbishop should entertain at the stage of confirmation.

So far as the objections were based upon charges of heresy or ecclesiastical offences, there is a further objection which should, I think, receive attention. It has been invariably laid down by writers on ecclesiastical law that such charges must be alleged with precision and particularity (see, among many others, Ayliffe, p. 345), so that the person charged may know exactly what offence is alleged against him. This view of the law has been repeatedly enforced by the Ecclesiastical Courts and the Privy Council. As I understand them, these decisions rest, not on any modern rule or practice, but upon the nature of the alleged offences, as, for instance, breaches of the various statutes. If this be so, it seems to afford an additional argument against the possibility of such charges being entertained in such proceedings as those which are now under consideration.

A point was raised in argument by the Attorney-General, on which I do not express any opinion, but which I ought not to leave entirely unnoticed. These proceedings for confirmation have for a great many years taken place before the vicar-general. As far as I can gather from the authorities cited on the argument and from some others which I have been able to consult, the Court of the vicar-general does not entertain contentious cases. This is clearly laid down in Oughton, Prolegomena, p. xvi., and is supported by Ayliffe's Parergon, p. 160; Lyndwood, liber 2, tit. 4, p. 104; and there is the high authority of Lord Stowell in the case of *Thorpe* v. *Mansell* (1), in which the limits of the jurisdiction of the vicar-general in such matters are clearly pointed out. But inasmuch as the letters patent to Mr. Cripps appointing him vicar-general also appointed him official principal, I am not sure that the objection raised by the Attorney-General is of substance; the point may require further consideration should the extent of the jurisdiction of the vicar-general ever become a matter for decision. It is not, in my opinion, necessary to decide that in no case can any objection be raised at the stage of confirmation which might have to be investigated by the vicar-general or the archbishop, as, e.g., an objection to the validity of the election or the genuineness of the documents produced, the identity of the person elected with the person named in the letters missive, or possibly some action or conduct of the bishop-elect since the time of his election; but I hold, for the reasons I have given, that the vicar-general ought not to entertain, still less adjudicate upon, charges of the character alleged in the objections tendered by either of the opponents to the confirmation in this case.

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(1) 1 Hagg. Cons. 4, n.; Jebb, 227.

As regards the note or addendum to the citation, I need only repeat that which I said upon the motions for the rules nisi, that, in my opinion, it would be no ground for mandamus that the archbishop or vicar-general had required objections to be presented in writing before the actual ceremony; but I may add that, in view of the questions that have been raised, I think it a proper course, so that the character of the proposed objections, if any, may be fully considered.

For the above reasons, which I have expressed I fear at too great length, and yet not with the clearness with which I might have expressed them had more time for research and consideration been at my disposal, I am clearly of opinion that these rules should be discharged.

I cannot part with the case without observing that it seems to me worthy of consideration whether the form of public citation, which ought to be retained for some purposes, should not be modified so as to meet the real case and remove the possibility of the observation that it is a temptation to people to raise questions at an unsuitable time and place. If the facilities for trying questions of heresy or other ecclesiastical offences are not sufficient the law should be amended. But, if the view which I have expressed is correct, I venture to deprecate the attempt to raise in a proceeding wholly unfitted for the purpose matters which must have received the anxious consideration of the responsible advisers of the Crown before the name of any person is inserted in the letters missive to the dean and chapter.

WRIGHT J. I can add nothing of importance to the judgment which has just been read; and it is only because of the division of opinion in Bishop Hampden's case that it is necessary to state the manner in which I arrive at the same conclusion as my Lord.

Even if the case depended solely upon the language of the statute 25 Hen. 8, c. 20, I should have strongly inclined to the opinion of Erle J. that the language of the statute precludes the archbishop from entertaining judicially any objection whatever to the election made in accordance with the Sovereign's command. If, indeed, anything were brought to his notice by opposers or otherwise, which might suggest to him that the Sovereign had been deceived or misinformed, he might, in my opinion, properly delay confirmation or consecration until the Sovereign's direction could be taken. But it seems to me nearly impossible to construe the statute as authorizing the archbishop to declare judicially that the election which the statute says is to stand good and effectual to all intents, and which he is expressly directed to confirm, is void. If it had been intended to give him such a power or discretion some provision must have been made for the manner and consequences of rejection. And, I think, there is much force in the Attorney-General's argument that it is incredible that the Crown should have been intended to be in a worse position than a private patron, who can enforce his nomination by quare impedit. No doubt the Crown has in præmunire a more effectual remedy in a case in which it is appropriate than the subject has, and it is appropriate enough if the archbishop has no jurisdiction or discretion; but it would not be appropriate for determining whether the archbishop has rightly exercised a jurisdiction or discretion vested in him by law.

But the case does not depend solely on the language of the statute. About 350 years have elapsed since the statute was passed, and it is admitted that there has not during all that time been any case in which the archbishop has entertained an objection to the election of a bishop on the Crown's nomination. Nor does the case stand as if the matter had never been considered. It was definitely raised so early as 1628 in Mountague's case, and it has been the subject of observation and discussion by text-writers during the whole period since the passing of the statute. It has twice, at least, been the subject of decision by eminent civilians—in the case of Bishop Hampden and again in the case of Bishop Temple, and, in my judgment, there is a great preponderance of opinion in favour of this construction. We do not know with any accuracy what was the reality of opposition to confirmation of elections of bishops before the statute of Henry VIII., but we have abundant and uncontradicted evidence that since the statute the opposition has been treated as a mere form. We have a complete register of the proceedings at the confirmation of Archbishop Parker in 1559, shortly after the date of the statute, and substantially the same forms have been continued to the present day, and they shew in the most convincing manner that although an ancient form of objection has been preserved it has never since the statute retained, if it ever possessed, any reality. The only judicial inquiry has been whether the proper forms of election have been followed and whether the bishop-elect was qualified as the law requires; and even this inquiry has always, so far as we know, taken the form of summary and ex parte proof by the electoral chapter without any admission of traverse by objectors. Then, even if it is still necessary to cite opposers, and even if they ought to be heard to state their objections, I think that the only conclusion would be that the opposers have no locus standi to do more than to suggest to the archbishop the matters of objection, not as matters for decision by him, but at most as matters which in his discretion he may take into consideration for the purpose of deciding whether he will make any representation to the Sovereign; and, if so, mandamus will not lie. The case is not like *Rex* v. *Archbishop of Canterbury* (1), where the archbishop was bound to exercise a judicial discretion as to the licensing of a lecturer, and where it was said that he ought not to reject proper means of information to guide his judicial discretion. Here there is no judicial discretion to exercise as to the particular objections raised. The principal opposers' objection in this case is one of heresy, and where the archbishop is called upon to refuse confirmation on a ground of this kind it is not immaterial to ask what means he has for trying such a question. Consistently with the forms in use for 350 years there is no room for such an inquiry. No procedure is provided, or ever has been provided, for it. The bishop-elect is not made a party. No sentence could be pronounced. If in such a case a mandamus were to go we should in effect be directing the archbishop to try and determine issues of heresy without any established form of procedure and without power to pass any sentence or to do anything but inform his own conscience. I know of nothing to shew that he can have any such right or power which could properly be described as jurisdiction; and, if he has not what amounts to jurisdiction, the mandamus cannot go.

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(1) 15 East, 117.

RIDLEY J. But for the importance of this case I should not have thought it necessary to add anything to the judgments of my Lord and my brother Wright, with which I agree. The question is whether a mandamus ought to go to the Archbishop of Canterbury to order him to hear and decide on objections made by the applicants on doctrinal grounds to the confirmation of the election of the Rev. Canon Gore to the Bishopric of Worcester. The answer depends upon the proper construction of the statute 25 Hen. 8, c. 20. Does that statute place on the archbishop the duty of hearing objections put forward and of judicially determining, after hearing them, on the validity or invalidity of the election, and on the fitness or unfitness of the person elected? Or, on the other hand, on proper evidence being offered, informing the archbishop that the election has been in fact held according to the congé d'élire, and as to the personal qualifications of the elected, is he bound to confirm? I am not proposing to examine all the authorities which have been quoted in the very learned arguments addressed to us on the hearing; but I shall endeavour to summarise and to bring the results to bear on the main question—namely, the construction of the statute.

First of all, the usages prevailing at the time of the passing of a statute are of importance, and must be considered when the meaning of the phrases or expressions which it contains is to be determined, though they cannot be used to contradict the plain terms of an enactment. What, then, was at that time the usage or custom in England as to the election, confirmation, and consecration of bishops? I think the fair deduction from the authorities is that bishops were at this time appointed by the pope on the nomination of the Crown, and that the election by dean and chapter had long become a formal matter: Green's History of the English People, vol. ii. p. 160; Stubbs' Constitutional History, vol. iii. p. 339–341. But it is necessary to inquire more precisely what was the nature of the confirmation required. And I think that in the earlier centuries, and as a part of the foreign canon law, it is probable that the ecclesiastical authority did, before confirming a bishop, summon objectors and determine their causes of objection. Authority was quoted to that effect, and it would seem, from Justinian, Novel 123, that in those times, if objections were found on inquiry to be without substance, those who made them were subject to expulsion from the province. There is no trace of any such custom or law in England, although it appears that down to the year 1316, according to the instances quoted from Wharton's Anglia Sacra, objectors were summoned, appeared, and were heard, and that in some cases confirmation was refused. These instances occur chiefly in the thirteenth century, after the Charter of King John. Between the year 1316, however, and the reign of Henry VIII. no instance was quoted in which objectors had appeared; and I think this much is certain—that during this period of about 200 years, although it was the duty of the archbishop to inform himself of the identity of the bishop-elect and of his qualifications, he did not at the ceremony of confirmation hold anything like a judicial inquiry. During this same period (with a brief interval to which I need not further allude), the confirmations were in the hands of the pope. In some instances he issued bulls, ordering the confirmation to be held in England, but when that was not done it took place at Rome, and objectors to a bishop elected to an English see could hardly have appeared there to make their objections. At the outset of this period (though with vicissitudes) it seems that the papal influence was predominant upon the whole; but later on, in return for the annates, the popes were willing to accept the nominees of the Crown. "They had other objects in view than the influencing of the national churches, and the end of their spiritual dominion was at hand": Stubbs' Constitutional History, vol. iii. p. 341. There is no instance, I believe, to the contrary of this in the reigns of Henry VII. or Henry VIII.—a period of about fifty years, reckoning to the date of this statute. If that is correct, it shews that at the time now in question the ceremony of confirmation was one of form rather than of substance; nor do the historians seem to have considered that it required any special mention while discussing, as between the Crown, the pope, and the deans and chapters, the right to the election and appointment of bishops—a fact, in my opinion, of much cogency. Certainly it was not a judicial process. It should be added, however, that in the documents it still appears to have been stated, as a matter of form, that opposers had been cited and had not appeared.

In this state of things the statute 25 Hen. 8, c. 20, was passed, which begins by reciting what is known as the Annates Act (23 Hen. 8, c. 20), and then enacts that it shall stand, and that no annates shall be sent to Rome, and no bulls received from Rome. Thus was the jurisdiction of the pope done away with in this country. No doubt this was one of the main objects of the statute; but I pause to say that I cannot accept the argument of Mr. Haldane, who contended that it was the only one. To do so is to give no effect to the further sections of the statute, and particularly to s. 3, which, in a preamble of its own, states that "it is not plainly and certainly expressed" in the recited statute "in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm." Another object of the statute, therefore, was to settle that matter for the future. Sect. 4 directs that the dean and chapter shall within twelve days elect the person named in the letters missive of the King; and in case of default that the King may nominate and present to the archbishop such person as he may think able and convenient for the vacant bishopric; and then comes s. 5, which enacts, first, that in case of such nomination and appointment the archbishop shall, with all speed, invest and consecrate without any recourse to Rome; and, secondly, that in case the dean and chapter shall elect the person named in the letters missive, their election shall stand good and effectual to all intents, and the person so elected shall be reputed and taken by the name of the lord-elect of the bishopric; then, the oath and fealty appointed for the same being made to the King by the person so elected, the King shall signify the election to the archbishop, commanding and requiring him to confirm the said election, and invest and consecrate the person so elected. Sect. 7 further provides that, if the archbishop shall refuse and do not confirm and consecrate the person so elected or nominated within twenty days he shall incur the penalties of præmunire.

Now, upon the natural meaning of the words contained in these enactments, I accept the reasoning of Erle J. in the *Hampden Case*. (1) It appears to me clear that the intention was to give the nomination of bishops to the King. As to the choice of person, no one was to have power to interfere. Certainly, if the dean and chapter do not elect the person named, a nominee of the King, thought by him able and convenient, is to be consecrated by the archbishop without any power in the latter to refuse or delay; and it is extremely difficult to follow an argument contending that in the alternative case, where the dean and chapter do elect the person named, there is to be any difference in the power left to the archbishop. It can hardly be contended that the King's nomination is to be without question in the one case where his letters are not obeyed, and is to be questioned in the other where they are obeyed. I further agree with Erle J. that, if these words be taken in their strict natural meaning, a command to confirm gives no authority to annul. A cogent argument in the same sense is, in my opinion, to be founded on the enactment that the election shall "stand good and effectual to all intents." Yet, according to the argument for the rule in this case, it is precisely in that event—namely, in the event of the person named being elected—that there is to be a discretion in the archbishop in the exercise of which he might annul the election.

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(1) 11 Q. B. 483, at p. 566.

This being the natural meaning of the statute, it is argued that we must read it otherwise, because the word "confirm" had a recognised sense at that time, in which we must read it —namely, that it included an examination into the validity of the election and the qualifications of the elected, and a judicial determination upon all objections put forward before the confirming authority. By this reading would be given to the archbishop power and authority to disaffirm and annul the election, a power and authority which it is at least foreign to the general scope of the statute, if not contradictory of its terms, that he should have. If the word had at the time such a definite meaning, it may be that it should be so read, although it is strange that, having so important an effect on the operation of the statute, it should have found no place in the recited statute, or in the preamble. But the true answer to this argument is that it has not been made out that the archbishop did in fact at that time (even if he ever had done so) hold any such Court, or exercise any such authority or jurisdiction. This, as is shewn in the elaborate judgment of the Lord Chief Justice, and so far as can now be ascertained, is the result of the authorities.

Next it was argued that the practice ever since the time of Henry VIII. has been such as to support the contention of those who apply for the rule. But this, again, is not the fact, for it appears to have proceeded on the former lines. Archbishop Parker's case has not been treated as an authority, and the circumstances were unusual; but in this particular it does not seem to have differed from other instances, for the evidence was not given by an opposer; and, on examining the register of that case, it appears that in the citation of opposers it was there expressly stated that, whether opposers should come or not, the Court would proceed. The words are to be found at more places than one in the record. (1) I think it is clear that the words attributed to Dr. Rives in *Mountague's Case* (2) cannot be treated as an authority for this purpose; and there is no later instance to be found in which opposers have either appeared or been heard, except in the cases of Dr. Hampden and Dr. Temple. With regard to the passage quoted from Bishop Fell's Epistle of St. Clement (1), in which he says, "et nemine comparente quod tamen non semper evenit," it appears that this publication dates from about 1669, and therefore these words, which indicate that on some occasions opposers might appear, may be taken as referring to *Mountague's Case* (2), which had happened about forty years before.

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(1) Jebb, 62.

(2) 6 State Trials (N.S.) 427, note (b).

It was further argued that as the words of the statute are "confirm, invest, and consecrate," if from our decision it follows that confirmation is a form, it must also follow that consecration is so. I would strongly repudiate this contention. Consecration of a bishop to his sacred office can never be a mere form; it is the solemn and sacred service performed by the Church, by which the bishop-elect is admitted to execute his office. Confirmation, on the other hand, is merely the confirmation of an election already held. Consecration will be performed according to the solemn ritual of the Church in that behalf, and after examination held as prescribed by that ritual. Confirmation may be in any form—possibly not dictated by any law, though probably shaped by precedent. And, so far as confirmation is concerned, if the election by the dean and chapter was to be nothing but a form, solemn, indeed, yet but a form, I can see no reason why the confirming of it should not be a form also. But it is hardly necessary to point out that this has no application to consecration.

There are other reasons in favour of the construction of the statute which I think the right one, and I have not omitted them in arriving at this decision. Thus, where is the form of procedure? How is the Court to determine such questions as those raised in this case? Are they to be heard in the absence of the person concerned? Between whom are the issues to be joined, and how are they to be considered? If that was intended, the Legislature surely must have made provision on these subjects. There is also the forcible argument derived

(1) Jebb, 388, 479.

(2) 6 State Trials (N.S.) 427, note (b).

from the recital in 1 Edw. 6, c. 2, and there is the high authority of Coke, Gibson's Codex, and others in later times, including Dr. Lushington. And on the other side I find no authority which has similar weight. I am, therefore, of opinion that the rules should be discharged.

At the conclusion of the judgment the Attorney-General asked that the rules might be discharged with the costs of the Crown and of the archbishop. No objection was raised as to the right of the archbishop to receive his costs, but objection having been taken to the right of the Crown to costs upon an application for a prerogative writ of mandamus, the argument on that point was adjourned to a future day.

Feb. 14. *Danckwerts, K.C.* (*Morton Smith* with him), for Garbett. The archbishop and vicar-general are no doubt entitled to their costs, but as their case was taken up by the Crown their own costs are merely nominal, and their general right to costs must stand or fall with that of the Crown. The Crown are not entitled to costs, for they were not parties to the original rules.

[LORD ALVERSTONE C.J. That is immaterial; they were properly served with the rules, and appeared to shew cause against them.]

Apart from statutes, there is an inflexible rule of the common law that the Crown neither pays nor receives costs; this is clearly laid down in 3 Blackstone's Commentaries, p. 400, and the statement is adopted in Chitty's Prerogative of the Crown, p. 310. The same rule will be found in West on Extents, c. 22, p. 227; Manning's Exchequer Practice, c. 8, p. 69; Fowler's Exchequer Practice, ii. p. 313. And the same rule applied in scire facias, where the Crown was a party: *Rex* v. *Miles*. (1) Modern practice has entirely recognised the general principle: *Rex* v. *Corum* (2); *Lord Advocate* v. *Lord Douglas*. (3) *Smith* v. *Earl of Stair* (4) is an authority the same way, for it shews that where there is a relator the Crown can get its costs, though after consultation with the Master of the Rolls the House of Lords refused to give them: *Lord Advocate* v. *Hamilton* (1); *Kane* v. *Reynolds.* (2) In *Moore* v. *Smith* (3) the right to costs depended on statute. In *Reg.* v. *Bishop Wearmouth Burial Board* (4) it is true that Jessel M.R. said that costs must follow the event; but this was a mistake, and was in fact subsequently corrected. The note in *Mews* v. *Reg.* (5) is also a strong authority, and so is *Middlesex Justices* v. *Reg.* (6)

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(1) (1797) 7 T. R. 367.
(2) (1792) 1 Anstr. 50.
(3) (1842) 9 Cl. & F. 173, at p. 184.
(4) (1849) 2 H. L. C. 807.

The only statute giving costs in mandamus is 9 Anne, c. 20, and that only applies where the rule has been made absolute and there has been a return to the writ. Where a rule for a mandamus is discharged, costs are payable at common law on the ground that the party should be punished for improperly setting the law in motion: see Vin. Abr. vol. vi. p. 322; *Pringle* v. *Secretary of State for India* (7), per Bowen L.J. The rules under the Judicature Acts do not give the Court power to give costs in cases where they could not have done so before; they only regulate the mode of dealing with costs where the Court has jurisdiction at common law or by statute to award them: *In re Mills' Estate* (8); consequently Order LXV., r. 1, has no application.

Bramwell Davis, K.C., and *B. Whitehead*, for Cobham, did not argue.

H. Sutton, for the Crown. The Court has jurisdiction to award costs to the Crown. In *Moore* v. *Smith* (3), which was an appeal under 20 & 21 Vict. c. 43, against a conviction on information laid by an excise officer on behalf of the Crown for an offence under an Excise Act, it was held that the Court, on affirming the conviction, had jurisdiction under s. 6 to award costs to the Crown, as the statute included cases to which the Crown was, directly or indirectly, a party. The Crown have a statutory right to these costs. Under 1 Will. 4, c. 21, s. 6, upon applications for a writ of mandamus, whether granted or refused, the costs are in the discretion of the Court. The language of the section is wide enough to include proceedings to which the Crown is a party, and as a fact costs have frequently been awarded both to and against the Crown under that section, though there is no reported case where the Crown has got costs under it. It is true that the section was repealed by the Statute Law Revision Act, 1881 (44 & 45 Vict. c. 59); but this Act by s. 6 gave a larger power than that in the Judicature Acts to make rules of Court; and the Supreme Court Rules of 1883 were applied to part of the Crown procedure, including mandamus. The general effect of Order LXV., r. 1, Order LXVIII., r. 2, and Crown Office Rules, 301 and 302, is to give the Court a discretion over costs in all cases.

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(1) (1852) 1 Macq. 46, at p. 55.

(2) (1854) 4 D. M. & G. 565, at p. 571.

(3) (1859) 1 E. & E. 597.

(4) (1879) 5 Q. B. D. 67, at p. 72.

(5) (1882) 8 App. Cas. 339, at p. 353.

(6) (1884) 9 App. Cas. 757, at p. 786.

(7) (1888) 40 Ch. D. 288.

(8) (1886) 34 Ch. D. 24.

Danckwerts, K.C., was not called upon to reply.

Cur. adv. vult.

March 3. LORD ALVERSTONE C.J. read the written judgment of the Court prepared by

WRIGHT J. In this case rules nisi were granted, at the instance of the prosecutors Cobham and Garbett, calling on the Archbishop of Canterbury and his vicar-general to shew cause why a prerogative writ of mandamus should not issue commanding them to hear opponents of the confirmation of Canon Gore as bishop-elect of the Diocese of Worcester. Notice of the rules was directed to be served on the dean and chapter; there was no similar direction to serve the Treasury on behalf of the Crown, but the application affected the rights of the Crown, and in our opinion the Attorney-General had a clear right to oppose the motion. Cause was shewn before us by the law officers appearing on behalf of the Crown without objection raised, and by counsel on behalf of the archbishop and vicar-general, and after argument the rules were discharged, costs being allowed to the archbishop. The only question remaining to be considered is whether we have jurisdiction to order the prosecutors to pay costs to the Crown.

We have not been referred to any case, nor have we been able to discover any, in which the ancient doctrine that in matters at common law "the Crown never paid nor received costs," as it is laid down by Lord Campbell C.J. in *Reg.* v. *Beadle* (1) (accord. *Rex* v. *Miles* (2); and see *Lord Advocate* v. *Lord Douglas* (3); *Smith* v. *Earl of Stair* (4)), has been expressly questioned in relation to the prerogative writ of mandamus. There have certainly been some instances in which the doctrine has been disregarded, whether from inadvertence or otherwise we do not know; but in the only reported cases in which it has been considered it has been admitted at the bar, whether in favour of or against the Crown; and we think that neither the Act 1 Will. 4, c. 21, s. 6, nor the existing Rules of the Supreme Court have altered the law as affecting the present case.

We must not be understood as expressing any opinion either in relation to matters other than the prerogative writ of mandamus, or even as to that writ when it is applied for by or against the officers of executive departments of the public service in relation to their statutory or other duties. On the one hand, the fact that statutes have been passed providing for the payment of costs to the Crown in relation to Crown specialties (33 Hen. 8, c. 39), by or to the Crown upon petitions of right (23 & 24 Vict. c. 34), or upon revenue suits (18 & 19 Vict. c. 90, and 22 & 23 Vict. c. 21), proceedings in relation to customs (40 & 41 Vict. c. 13, s. 5), and proceedings by the Commissioners of the Admiralty (27 & 28 Vict. c. 57, s. 11; 28 & 29 Vict. c. 124, s. 2· 31 & 32 Vict. c. 78, s. 5), is of some weight as an indication that express legislation was necessary in order to exclude the rule of the common law. On the other hand, as incidental to departmental administration, there must often be litigation which does not directly affect any prerogative of the Crown, and as to which no good reason can be assigned for the denial of costs to the successful party. And the case of *Moore* v. *Smith* (5) supports this view.

The question does not arise in this case, but it may be worthy of consideration whether the Act of 1881 (44 & 45 Vict.

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(1) (1857) 7 E. & B. 492.

(2) 7 T. R. 367.

(3) 9 Cl. & F. 173.

(4) 2 H. L. C. 807.

(5) 1 E. & E. 597.

1902

REX
v.
ARCHBISHOP
OF
CANTERBURY.

Wright J.

c. 59), s. 6, gives power to make Rules of the Supreme Court in relation to "proceedings by or against the Crown." The words are primâ facie wide enough to include power to make provision for costs; but it may be that the decision in *In re Mills' Estate* (1) shews that the terms of this section cannot be construed so widely as to enable rules to be made binding the Crown to pay costs in all cases. We agree with the Court of Queen's Bench in *Reg.* v. *Beadle* (2) that it is very desirable that such provision should be made, and if effectual and proper provision cannot be made by rules for enforcing payment of costs by the Crown, the matter is one very proper for the consideration of the Legislature. In the Crown Suits Act and the Petition of Right Act a special procedure is provided; but in the Customs and Admiralty Acts a simple declaration of liability was regarded as sufficient.

In the present case, for the reasons which we have given, we cannot make any order for payment of costs to the Crown.

Rules discharged with costs of the archbishop.

Solicitor for the Crown, the Archbishop of Canterbury, and the vicar-general: *Solicitor to the Treasury.*

Solicitors for bishop-elect: *Peacock & Goddard.*

Solicitors for prosecutor Cobham: *Wainwright & Co.*

Solicitor for prosecutor Garbett: *R. Todd.*

(1) 34 Ch. D. 24.

(2) 7 E. & B. 492.

W. J. B.

C. A.

1902
July 15.

[IN THE COURT OF APPEAL.]

THE LONG EATON RECREATION GROUNDS COMPANY, LIMITED *v.* THE MIDLAND RAILWAY COMPANY.

Lands Clauses Act—Land injuriously affected—Restrictive Covenant—Compensation—Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 68.

The breach of a restrictive covenant may be the ground for a claim for compensation, under s. 68 of the Lands Clauses Consolidation Act, 1845, by the owner of land for the benefit of which the restriction was imposed.

A railway company took, for the purpose of their undertaking, land which was subject to a covenant, entered into by their vendor, not to erect thereon "any building other than private dwelling-houses." The company erected a railway embankment on the land:—

Held, that the erection of the embankment was a breach of the covenant.

Appeal from a judgment of Lawrance J. on further consideration.

The plaintiffs were owners in fee simple of land situate at Long Eaton, in the county of Derby. A portion of the land was laid out as a recreation ground, bounded on one side by a new road called Springfield Avenue. The remainder of the land on the further side of the avenue was laid out for building. This building land was sold to various grantees subject to covenants on their part not to erect or permit to be erected any erection or building of any kind (except a fence wall not more than two feet high with suitable palisades) nearer to Springfield Avenue than the line drawn on a plan annexed to the conveyances and marked "building line," and not to erect any buildings on the land conveyed other than dwelling-houses of a specified value. The defendant company, before obtaining statutory powers to construct a proposed line of railway, purchased by agreement from the grantees the lands in their hands, and took them with notice of the restrictive covenants. They subsequently obtained an Act incorporating the Lands Clauses Consolidation Act, 1845, and authorizing the making of the proposed railway, and they erected an embankment on the land bought by them of the grantees of the plaintiffs. It was an admitted fact that the foot of the embankment encroached towards Springfield Avenue beyond the building line above mentioned for about two-thirds of the frontage to the avenue. Instead of the two feet fence wall with suitable palisade the company put up a post and rail fence nearer to Springfield Avenue than the building line. No land belonging to the plaintiffs was scheduled by the company, nor was any purchased by them.

The plaintiffs claimed compensation under the Lands Clauses Consolidation Act, 1845, s. 68, on the ground that their property was injuriously affected, and on an inquiry before the sheriff and a jury a verdict was given for the claimants with damages assessed at 650*l.*

An action was brought by the plaintiffs to recover the amount awarded by the sheriff's jury, and was tried before Lawrance J. and a special jury, and in the answers to questions put to the jury they found that the embankment extended beyond the building line. The jury also found that the portion of the embankment beyond the building line did not render the land on the opposite side of the avenue of less value, but that the embankment on the further side of the building line and the post and rail fence did so. On further consideration the learned judge held that the embankment was a building within the meaning of the covenant, and that land which is entitled to the benefit of a restrictive covenant is injuriously affected within s. 68 of the Lands Clauses Consolidation Act, 1845, if that benefit is extinguished, although no part of the land itself is taken. Judgment was given for the plaintiffs.

The defendants appealed.

Baggallay, *K.C.*, and *C. H. Sargant* (*W. J. Noble* with them), for the defendants. There is a distinction between the two covenants. The first applies to the land between the road and the building line, and is against erecting any erection or building of any kind except the fence wall. The second applies to the land behind the building line, and deals with the erection of any buildings except private dwelling-houses. This covenant is not so wide as the other, and an embankment is not included in it under the word "building." The notice to treat was in respect of the embankment as a whole, and the sheriff's jury assessed compensation without distinguishing between the claim that could be supported and that which could not be supported. Their verdict is only conclusive as to the amount of damages (if any), and not as to the fact of damage, and as it includes matters for which no compensation was payable it cannot be enforced in this action: *Beckett* v. *Midland Railway* (1); *Buccleuch* (*Duke of*) v. *Metropolitan Board of Works*. (2)

Assuming that there have been breaches by the defendants of the restrictive covenants, these are not matters in respect of which compensation can be given under s. 68 of the Lands Clauses Consolidation Act, 1845. There must be an injury to an "interest in land" in order to give a right to compensation under the statute: *Metropolitan Board of Works* v. *McCarthy*. (3) The benefit of a restrictive covenant, even if annexed to land, has never been held to be an interest in that land giving a right to compensation under the statute: see *Baily* v. *De Crespigny* (4); Cripps on Compensation, 4th ed. pp. 106, 107. In *Kirby* v. *Harrogate School Board* (5) the decision only goes to shew that, if the plaintiff had any remedy against the school board, it was to obtain compensation under the Act and not by action. Here the benefit of the restrictive covenants is not annexed to the plaintiffs' land. It is not an "interest in land," but merely a right personal to the plaintiffs, in respect of which their remedy (if any) is by action. Sect. 68 does not apply where no land or interest in land has been taken by the persons from whom compensation for an injurious affecting is sought.

[They also referred to *Renals* v. *Cowlishaw*. (6)]

Hugo Young, K.C., and *W. H. Stevenson*, for the plaintiffs. The embankment is admittedly an "erection" within the meaning of the covenant not to erect any erection nearer to

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(1) (1866) L. R. 1 C. P. 241.
(2) (1870) L. R. 5 Ex. 221.
(3) (1874) L. R. 7 H. L. 243.
(4) (1869) L. R. 4 Q. B. 180.
(5) [1896] 1 Ch. 437.
(6) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

Springfield Avenue than the building line; it is also a "building" within the meaning of the covenant not to erect any building other than private dwelling-houses. The meaning of the word "building" is not necessarily limited to houses and similar structures. To build may be defined as to construct, and the embankment, and railway line on it, with the sleepers and blocks of stone upon which the line is laid, form a structure which is built up, and therefore a building. The defendants' special Act enables them to construct a railway with all necessary works. They may, therefore, put on the land in question stations, goods sheds, and signal-boxes, which are undoubtedly "buildings." Compensation under the Lands Clauses Consolidation Act, 1845, is intended to be given once for all, and the plaintiffs were entitled to have compensation assessed in respect of the probable use of the land under the defendants' statutory powers to use it for the purposes of a railway. If there has been any excess of jurisdiction in assessing compensation the defendants' proper remedy is by certiorari; the inquisition cannot be impeached in an action to recover the amount of compensation which has been given: *Corrigal* v. *London and Blackwall Railway* (1); *Mortimer* v. *South Wales Railway* (2); *Metropolitan Board of Works* v. *Howard.* (3) A breach of a restrictive covenant may affect the market value of the land for the benefit of which it was imposed, just as the destruction of an easement may depreciate the value. *Baily* v. *De Crespigny* (4) was a decision in a case in which vis major came in and the covenantor was held not to be liable, and is no authority against the claim in this case. *Kirby* v. *Harrogate School Board* (5) is an authority in favour of the claim, for it is difficult to suppose that all the members of the Court went out of their way to suggest a claim for compensation that could not be supported; and the same may be said of *Manchester, Sheffield and Lincolnshire Railway* v. *Anderson.* (6)

[They cited also *In re Masters and Great Western Railway* (7);

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(1) (1843) 5 M. & G. 219.
(2) (1859) 1 E. & E. 375.
(3) (1889) 5 Times L. R. 732.
(4) L. R. 4 Q. B. 180.
(5) [1896] 1 Ch. 437.
(6) [1898] 2 Ch. 394.
(7) [1901] 2 K. B. 84.

Fleming v. *Newport Railway* (1); *Caledonian Railway* v. *Walker's Trustees* (2); *Stone* v. *Yeovil Corporation.* (3)]

C. H. Sargant, in reply.

COLLINS M.R. The question in this case arose on a claim under s. 68 of the Lands Clauses Act, 1845, against the defendants on the ground that they had by their works injuriously affected the land of the plaintiffs. The claim came before a sheriff's jury, who found that the amount due as compensation was 650*l.*, and an action was brought to recover that sum. The action resulted in a judgment for the plaintiffs, and it is now said that was wrong because, though there may have been damage in fact, it was not recoverable at law.

The question arises in this way. The plaintiffs were owners of land a large portion of which they devoted to a recreation ground, and the remainder they laid out as building land and sold to purchasers, subject to certain restrictive covenants limiting the user by the purchasers of the land bought. The two restrictions material in this case are contained in two covenants. There was a building line drawn on a plan attached to the conveyances, and one set of covenants related to the space between the building line and the actual boundary of the land conveyed. The other set related to the land behind the building line. The railway company acquired from the purchasers the whole of the land they had bought, and upon it they built an embankment for the railway they were making. It was admitted that what is called the toe of the embankment, by which I understand is meant the line at the bottom of the embankment, encroaches on the land between the building line and the boundary, and is, in ordinary parlance, thereon.

The first covenant is that the purchasers " will not erect or permit to be erected upon the said pieces of land respectively any erection or building of any kind, except a fence wall not more than two feet high with suitable iron palisades, nearer to Springfield Avenue aforesaid than the line drawn on the said plan and marked 'building line.' " That relates to the strip of land between the building line and the boundary. The other covenant relates to the land behind the building line, and is that the purchasers "will not erect any building on the said piece of land hereinbefore secondly described other than private dwelling-houses with proper conveniences, and all such houses shall front to Springfield Avenue aforesaid." It is said that the embankment is not a building, and that its erection involves no breach of the second covenant; but it is admitted that it is an erection, and that the part of it which extends over the building line constitutes a breach of the first covenant. But it is said there is a point which is common to both these cases, which is, that the covenants are merely restrictive, and a breach of them is not matter which gives a right to compensation on the ground that the plaintiffs' land is injuriously affected. The main point for our consideration is whether a breach of a restrictive covenant reserved for the benefit of the owner of the adjoining land is the subject-matter of a claim under the 68th section, on the ground that the land has been injuriously affected.

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(1) (1883) 8 App. Cas. 265.

(2) (1882) 7 App. Cas. 259.

(3) (1876) 2 C. P. D. 99.

A preliminary point made on behalf of the railway company is that if either of the two claims made by the plaintiffs in the proceedings before the sheriff cannot be supported, then, inasmuch as the award is for a lump sum, and does not distinguish between the two claims, it is bad altogether. Dealing first with that contention, it seems to me to rest on a misconception. The authority on which it is supported is an authority on an award, which is quite a different thing in its nature and results from an inquisition before a sheriff's jury. In *Beckett* v. *Midland Railway* (1), which was decided on demurrer, so that the facts must be taken as stated in the pleadings, the award embraced a matter not the subject of compensation. Under those circumstances, and dealing with an award, and for special reasons applicable to an award, it was held that the good being inseparable from the bad, the whole was bad. But a series of cases have been cited in which the like question arose, not on an award, but on an inquisition, in which it appeared that claims had been made that might

(1) L. R. 1 C. P. 241.

be legally the subject of compensation, and other claims that could not be. It was admitted that it was not possible on the face of the verdict to distinguish how much had been given in each class of claim, or indeed to say whether compensation had been given in respect of one class of claim only. Nevertheless, in a series of cases, of which the *Metropolitan Board of Works* v. *Howard* (1)—which went to the House of Lords—is the chief, it was decided that no objection could be taken ultimately at the hearing of an action to recover the compensation awarded by the verdict of the sheriff's jury, the proper course being in such a case to bring up the inquisition to quash it. Other cases were cited in support of this view, one being *Mortimer* v. *South Wales Railway* (2), as far back as 1859, and itself resting on the prior decision in *Corrigal* v. *London and Blackwall Railway*. (3) Therefore it seems to me to start with, that if one of the two claims is capable of being supported, it is immaterial that there was another which cannot be supported in point of law. For reasons that I am about to give, I think that the difficulty does not arise, for, in my judgment, both cases were in point of law available for grounding a claim for injuriously affecting the plaintiffs' land. That brings me to the main point whether the breach of a restrictive covenant can be a ground for a claim for compensation by the owner of land for whose benefit the restriction was imposed. There is, of course, the preliminary question whether the restriction is such, and is imposed under such circumstances, as to make it a restriction for the benefit of the land retained; but in this case it seems to me to be obvious that these provisions as to the particular class of building which alone was to be allowed on the land were for the benefit of the land retained. The covenant was intended to secure that nothing but private dwelling-houses of a certain value should face Springfield Avenue; and to place an embankment there instead of private houses is certainly a breach of what was intended to be provided for by the covenant. It is said that there has been no breach because an embankment is not a building, but what is provided for is that if any building is to be erected on the land it is to be a private house, and that would, in my judgment exclude, and was intended to exclude, anything in the nature of an embankment. In substance the covenant is that nothing but a private dwelling shall be erected on the land. If, however, it is necessary to say whether a railway embankment can be covered by the word "building," I see no reason for saying that it cannot. A building is not necessarily limited to a structure of bricks and mortar. There is nothing to negative this view, and it seems to me to be obvious that it comes within the sense of the covenant, and that to hold otherwise would be to defeat the object of the parties. We have, therefore, the admitted breach and the breach which has been contested, and, in my opinion, they are both breaches of the restrictive covenants. Then we come to the real point in the case—whether a breach of a restrictive covenant is the subject of compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. In point of principle, I cannot see why it should not be. A distinction has been drawn in cases under this section between injury to the person who happens for the time being to be owner of the land, and damage to the value of the land itself. If the damage in respect of which compensation is sought is only incident to the particular purpose for which the owner is occupying the land, that is held to be excluded from compensation; but if the market value of the land is affected then the land is affected. It is a matter of common sense that when by covenant, by an easement being attached, or in any other way the value of the land is enhanced, and the railway company subtract a portion of the value by making their railway, they are injuriously affecting the land. The matter was discussed in *Beckett* v. *Midland Railway* (1) by the late Sir James Shaw Willes, and it was pointed out that while an annoyance which the owner of a particular piece of land has to suffer in common with every one who lives near a railway is not subject-matter for compensation, the special subtraction of any right incident to the land is. He gave as an instance the case of land approached by a broad

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(1) 5 Times L. R. 732.

(2) 1 E. & E. 375.

(3) 5 M. & G. 219.

(1) L. R. 1 C. P. 241.

road which, by the operations of a railway company, has been narrowed, and pointed out that with regard to land, or a house on the land, injuriously affected by there being a narrow and difficult approach instead of a wide and easy one, it was obviously a case of injuriously affecting. That being so, why is not the withdrawal of a restriction imposed on the adjoining land for the benefit of the land retained to be the subject of compensation? No reason can be alleged except the suggestion that no authorities can be found to support this view. It seems to me that, starting with the principle, and coming to the conclusion that, apart from authority, the burden of shewing that the principle was not applicable would be on those who say that no compensation should be given, there is sufficient authority. In *Kirby* v. *Harrogate School Board* (1), when the opinion of the judges upon this point is examined, although it was not absolutely necessary for the decision of the case, it will be seen that they one and all expressed the opinion that the breach of a restrictive covenant is matter for compensation. North J. gave it as his opinion without any qualification whatever that "the principle which applies to an easement applies equally to the right which is created by a restrictive covenant." (2) Lindley L.J. said: "It follows that the school board are perfectly right in contending that an action for an injunction or damages is out of the question. If the plaintiffs can make out that they are injuriously affected, they will be entitled to compensation under s. 68 of the Lands Clauses Act. They are not in the position of a person who is in the enjoyment of some easement; but they have a right—a right conferred upon them by that covenant . . . . if they can make out that they are damnified they are entitled to compensation under s. 68. That was North J.'s view, and that is my view." (3) Kay L.J. said: "For the purpose of my present judgment I will assume that there has been a breach of covenant, and that it was such a breach as that, if s. 68 of the Lands Clauses Act did not apply to the case, it would enable the plaintiffs to obtain an injunction . . . . and assume that it is a case in which the Court would treat these covenants, or one of these covenants, as having been infringed, and that they would be entitled to an injunction: in my opinion, the language of s. 68 applies." (1) A. L. Smith L.J. expressed his view to the same effect. (2) These were more than mere expressions of opinion, for they were part of the train of reasoning by which the decision in that case was arrived at.

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(1) [1896] 1 Ch. 437.

(2) [1896] 1 Ch. at p. 443.

(3) [1896] 1 Ch. at p. 449.

There are two other cases in which a right of this nature was considered. In *In re Masters and Great Western Railway* (3) the right in question was not negative, but a right by covenant for the purchaser of mineral rights to sink a pit upon land of the lessor. The railway company took the land of the lessor, and the question was whether the colliery proprietor was entitled to say that his land was injuriously affected by the taking of land where otherwise he might have made a new pit. He could not enforce the right against the railway company, and it was held that there was a subject-matter for compensation. It seems to me that it can make no difference whether the right was an affirmative one to open a pit, or a negative one to have the premises kept in a certain condition for the benefit of the other land. In either case the value of the land to which the benefit was attached would be reduced.

There is one other case to which I ought to refer: *Manchester, Sheffield and Lincolnshire Railway* v. *Anderson.* (4) I agree that in that case the house which was said to have been injuriously affected by the breach of covenant for quiet enjoyment had to some extent been structurally injured; but that is not the whole substance of the decision, for there might have been a breach of the covenant for quiet enjoyment quite apart from the structural injury. Some remarks of Lindley M.R. are very material to the question now under discussion. He said (5) that he failed to see any answer to the contention of the railway company, which was that no action could be brought against them for anything they were lawfully doing

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(1) [1896] 1 Ch. at p. 449.
(2) [1896] 1 Ch. at p. 455.
(3) [1901] 2 K. B. 84.
(4) [1898] 2 Ch. 394.
(5) [1898] 2 Ch. at p. 400.

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under their statutory authority, and continued: "It is said that then the covenant is of no use to the defendant; but it is of very considerable use to him, for it may give him rights of compensation which otherwise he might not have. He may be able to prove, having regard to his covenant, that his land is injuriously affected when he could not prove it if he had no such covenant." That seems to me to be an authority on the principle, if not on the precise point, of the effect of a restrictive covenant. For these reasons on principle, there being no authority to the contrary, and such authorities as there are being, as it seems to me, in favour of it, I am clearly of opinion that the restrictive covenants in this case having been proved to have been broken, the breach of them is the subject-matter of a claim for injuriously affecting the land for the benefit of which they were entered into.

I should add that only one shadow of an authority bearing the other way was cited to us, and that really rested upon special observations made by Hannen J. in delivering judgment in *Baily* v. *De Crespigny*. (1) The remarks of the learned judge were introduced only with reference to the point that was before the Court, and he had not before him for decision, and does not seem to have addressed his mind to the question whether, had the claim been started as one for compensation, the claimant might not have succeeded. The learned judge was dealing with the general loss of amenities which gives no general rights. There was a covenant not to build on the land. The covenantor had to part with his land compulsorily to a railway company who built on the land, and an action was brought, not against the company, but against the covenantor. All that the Court had to decide was whether the covenantor could be sued on the ground of a breach of his covenant, and the dicta that have been relied on pointed out that the plaintiff was a person who had to suffer the inconveniences common to all persons who find their amenities reduced by the fact of a railway company taking land for the purpose of their undertaking.

For these reasons I think the appeal ought to be dismissed.

(1) L. R. 4 Q. B. 180.

MATHEW L.J. I am of the same opinion. The first objection that was made seemed to me not to be tenable either in fact or in law, and that was the complaint that was made about the inquisition. It is suggested that the jury may have awarded compensation in respect of that which was not the subject of compensation, and it was said that if that was the case the finding of the inquisition was wholly bad, and must be treated as null and void. Now with reference to the facts, when one comes to look at what took place before the undersheriff, it is clear that this was dealt with on the footing of the question being whether or not the embankment caused the depreciation of the property. No distinction was drawn as to the extent of the covenant, whether it extended the whole way or only over part of the property. The embankment was the subject that was complained of, and the embankment was the subject of assessment, and it is of the last importance that we should not allow, upon an inquisition of this sort, some suggestion to be made that there has been a miscarriage before the jury, which ought to have the effect of putting an end to the inquisition, because, if there were anything in the suggestion that was made, on the authorities that have been cited to us it is abundantly clear that the means of getting redress is by bringing the inquisition up by certiorari and setting it aside. It will not do, when an action is brought on the judgment, to say there was some irregularity in the proceedings before the undersheriff, in respect of which the inquisition is bad. That being disposed of, it is hardly necessary for me to add anything to what has been said by the Master of the Rolls. But the point has been taken that nothing has been done which was a violation of the covenant by the erection of this embankment. The covenant, which was a covenant in respect of an estate which had been laid out at considerable expense for building, and which it was desired to protect, runs in this way: "and will not erect any building on the said piece of land hereinbefore secondly described other than private dwelling-houses." It was said that the embankment was not a building within the meaning of the covenant. The object of the clause is to prevent the land being used for any other purpose than for the erection of private buildings. In that respect the covenant was broken. Then the last point is that, granting that this property has been intended for building, and that the covenant had been entered into and been violated, still that is not the subject of compensation under the 68th section of the Lands Clauses Act. No case was cited to us to justify such a conclusion. There have been a series of decisions brought before us, and though there has been no precise decision on the subject, yet over and over again there is an intimation from the highest authority that a restrictive covenant of this sort is the subject, of compensation under the Lands Clauses Act. It is extremely difficult to see why it should not be so. There is in this case a negative easement adding to the monetary value of the estate. Why that should not be the subject of compensation it is difficult to conceive. The covenant is entirely apart from and in addition to the rights of the public as against a railway company—rights that are taken away as soon as statutory powers are obtained. Statutory powers were never intended to affect a covenant of this sort, which is part of the value of the estate.

For these reasons I am of opinion that this appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion, and but for the general importance of one point in this case, I should be content not to add a word to the judgments which have been delivered. But the really important question here is whether a person entitled to the benefit of a restrictive covenant can make a claim that his land has been injuriously affected, if the land subject to the burden of the restrictive covenant is taken by a railway company. I confess I was surprised to hear that that was to be open for argument before us, for on principle, when one comes to consider what is the meaning and effect of a restrictive covenant of this nature, it is difficult to conceive a case which more clearly comes within certainly the spirit of the section, and I should have thought within the letter of it. What is the meaning of a restrictive covenant? I think Sir George Jessel described it as an equitable burden on the purchased property in favour of the vendor. Of course the burden only affects the value of the property in the hands of the covenantor, and persons taking with notice; but so long as these facts are continued there is an equitable burden on the purchased property in favour of the vendors. When the railway company come and relieve the property from that burden, they undoubtedly, it seems to me, deprive the vendors' property of a benefit which was reserved to it by the original instrument of conveyance. But then it has been said that it is not enough to shew that a covenant of this kind may be made for value: you must shew for whose benefit it was entered into—who was the person who could claim the benefit of it. It has been suggested that this is one of a class of cases which have undoubtedly given rise to great difficulty on the question whether an assignee is entitled to the benefit of the section. Here the plaintiffs are themselves the covenantees, and are not assignees, so that no such question can arise. It is quite clear that, in considering the question who are entitled to the benefits of the covenant, the conveyance itself must be looked at, and also all the surrounding circumstances. Now, on looking at the conveyance itself, I find that the entire property, including the recreation ground, was bought by the company, and conveyed to them by a conveyance in 1884, which is covenanted to be produced to the purchaser in the conveyance I have before me. The conveyance itself contains a plan shewing the Springfield Avenue, and shewing the recreation ground belonging to the company. The conveyance shews that it was part of a bargain between the vendors and the purchasers that the vendors should retain that part of Springfield Avenue which was next to the recreation ground, and that there should be mutual covenants for the making and maintaining of that road. It seems to me the absolutely inevitable result from the conveyance itself, and from all the surroundings, that these covenants were entered into for the benefit and protection of such portion of the property conveyed to the company, by the conveyance of 1884, as had not been disposed of at that time, and in particular for the benefit of the recreation ground, which was immediately on the other side of Springfield Avenue. Once

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arrive at that point, and it seems to me to follow necessarily that there is that which would have been an injury—a legal cause of action—but for the Act of Parliament. Then comes the Act of Parliament, and the sheriff's jury brought in to ascertain the actual damage which was sustained. Now, it is conceded that there has been a breach of one of these covenants, although it is said to be only a little one; and I agree with the Master of the Rolls in thinking that the erection of the embankment on that part of the land which is beyond the building line, and therefore farther away from Springfield Avenue, is nevertheless a breach of the other covenant in this conveyance. The embankment is not like a mere manure heap; it is a thing elaborate in construction; it is permanent in its nature. It would necessarily prevent the erection on this land of dwelling-houses of a certain value which, and which only, were intended to be erected thereon. I think, therefore, that the judgment of Lawrance J. was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *J. H. Lee & Watts, for Whittingham & Williams, Nottingham.*

Solicitors for defendants: *Beale & Co.*

A. M.

[IN THE COURT OF APPEAL.]

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1902
July 11, 12, 21.

MOLINEAUX *v.* THE LONDON, BIRMINGHAM AND MANCHESTER INSURANCE COMPANY, LIMITED.

Company—Director—Qualification Shares—Raising of Qualification—Vacation of Office—Companies Act, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 3, *sub-s.* 2.

The plaintiff, a director of a limited liability company, held the necessary qualification under the articles of 50 shares. By a resolution of the shareholders in general meeting the capital of the company was increased, and at the same time the qualification for a director was raised to 250 shares. The plaintiff, in his capacity of director, was present at the board meetings at which the increase of capital and the raising of the directors' qualification were discussed and approved, and also at the general meetings at which the resolutions were passed and confirmed on April 4 and April 19, 1901, respectively. On April 20 the secretary of the company without the plaintiff's knowledge entered the plaintiff's name on the register for 200 shares, the number necessary to make up his qualification; the secretary's act was subsequently ratified by the directors other than the plaintiff at a board meeting on May 8. On April 22 the plaintiff, as required by s. 9 of the Companies Act, 1900, signed a copy of the share prospectus, in which his name appeared as a director, and on the following day the prospectus was issued to the public. On May 16 the plaintiff sent in his resignation of the office of director:—

Held, that upon the passing of the confirmatory resolution the plaintiff had not vacated his office of director within the meaning of s. 3, sub-s. 2, of the Companies Act, 1900, either by failing to obtain the necessary qualification or by ceasing to hold it:

Held, further, that the plaintiff had contracted to obtain the necessary qualification within a reasonable time either by transfer from existing shareholders or directly from the company; that a reasonable time for acquiring the qualification had elapsed when the plaintiff in his capacity of director signed the prospectus that was issued to the public, and that, there being then a binding contract to take the shares, the plaintiff could not get rid of his liability for calls by subsequently resigning his office of director.

Appeal from a decision of Phillimore J. in an action tried without a jury at Birmingham. The only question in dispute upon the appeal arose upon a counter-claim by the defendant company for 50*l.*, the amount of a call upon 200 shares standing in the plaintiff's name in the company's books. The learned

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judge found that the plaintiff was liable for the amount of the call, and gave judgment upon the counter-claim for the defendants. The plaintiff appealed. The following statement of facts is taken from the written judgment of the Court.

The plaintiff was appointed a director of the company in May, 1899. By art. 70 the qualification of a director was the holding in his own right of 50*l.* in shares in the capital of the company. The plaintiff throughout held this number of shares. He had at one time 200 shares, but he sold fifty to a man named Brown, and he transferred 100 to his brother, apparently as trustee for himself. In February, 1901, at board meetings at which the plaintiff was present, it was resolved that a resolution be put to the shareholders at the next general meeting to alter the qualification of a director from fifty shares to 250 shares, and that the plaintiff should be elected a life member of the board subject to confirmation at the annual meeting. In March the share prospectus was provisionally approved; this had reference to a contemplated increase of the capital of the company from 10,000*l.* to 100,000*l.* The increase of the capital and the enlargement of the directors' qualification were parts of one scheme. On April 4 a general meeting was held at which resolutions were unanimously passed for increasing the capital by the creation of 90,000 new shares of 1*l.* each, and for altering the articles so as to make the plaintiff a life director. And art. 70 was cancelled, and a new article substituted making the qualification of a director 250 shares. On April 19 a board meeting was held, at which the date of the issue of the share prospectus was fixed for the 23rd instant. On the same day a general meeting was held at which the resolutions passed on the 4th were duly confirmed, and they thereby became special resolutions. The plaintiff was present at all these meetings. On April 22 the plaintiff signed the share prospectus, in which his name appeared as one of the directors. It was issued on the 23rd. On April 20 the secretary and manager entered the plaintiff's name on the register in respect of 200 shares, making with his original fifty his qualification. This was entered as of April 4, on which day the other directors had qualified, and on which day there was some conversation with the plaintiff on the subject of qualification. The plaintiff said he was not aware of this entry on the register until after his resignation.

On April 26 the plaintiff wrote to the secretary as follows: "If you can obtain a purchaser of my 200 shares at ten shillings, I shall be pleased to hand you 5*l.* and resign my seat." The plaintiff's view is that this relates not to the 200 new shares required to make up his qualification, but to the 200 old shares of which he still considered himself the real owner. He wrote a similar letter on May 3. A board meeting was held on May 8, at which the plaintiff was present, but not, as he says, as a director. A discussion took place. The plaintiff was under the impression that he had originally applied for 250 shares, and that he could get them back and thus acquire his qualification. The board did not accept this view. No conclusion was arrived at. On May 16 the plaintiff sent in his resignation of the office of director, which by art. 82 would become operative on June 16. The call in question was made on May 22. The plaintiff was not present at any board meeting after May 8. No application had been made by the plaintiff for rectification of the register. Under these circumstances Phillimore J. held the plaintiff liable in respect of the call on the 200 shares.

Disturnal, for the plaintiff. The plaintiff is not liable to the defendants in respect of these calls. Having regard to the facts proved in evidence, the plaintiff had ceased to be a director of the company, and his office of director had been vacated within the meaning of s. 3 of the Companies Act, 1900. (1) The expression "ceases to hold his qualification"

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(1) By the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 3, it is provided:—

"(1.) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company.

"(2.) The office of director of a company shall be vacated, if the director

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in sub-s. 2 means the share qualification provided for by the articles, and as soon as the confirmatory resolution of April 19 to increase the directors' qualification had been passed the plaintiff had no longer a proper qualification; he had ceased to hold his qualification by reason of the change in the constitution of the company. But, assuming that s. 3 is not applicable to the present case, there was no contract by the plaintiff to take these shares or to become a member of the company in respect of them. Mere acceptance of office as a director and acting as such do not constitute an agreement to become a member of the company within s. 23 of the Companies Act, 1862: *Brown's Case* (1); *In re Wheal Buller Consols* (2); they amount at most to an offer to qualify as director within a reasonable time: *Lord Inchiquin's Case* (3); *Hutchinson's Case.* (4)

[COLLINS M.R. On this part of the case the sole question seems to be whether there was an acceptance by the company of the plaintiff's offer, and there seems ample evidence of acceptance so as to make a binding contract.]

Assuming that there was an acceptance, the contract ceased to be binding when the plaintiff ceased to be a director: *Salisbury-Jones' Case.* (5)

[COLLINS M.R. In that case there was a special term in the articles that three months should elapse before the director should be deemed to have agreed to take shares from the company, and the director resigned his office before the expiration of the three months.]

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does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being reappointed director of the company until he has obtained his qualification.

"(3.) If after the expiration of the said period or shorter time any unqualified person acts as director of a company, he shall be liable to pay to the company the sum of five pounds for every day during which he so acts."

(1) (1873) L. R. 9 Ch. 102.
(2) (1888) 38 Ch. D. 42.
(3) [1891] 3 Ch. 28.
(4) [1895] 1 Ch. 226.
(5) [1894] 3 Ch. 356.

There was in fact not only no acceptance, but no offer by the plaintiff to take shares; his assent to the resolution to increase the qualification was not an offer to act as director and find the necessary qualification. The signature of the prospectus by the plaintiff is immaterial, for that was not equivalent to an offer on his part to take shares from the company. In any event, a mere offer to qualify is not an offer to take shares from the company, and does not become so until a reasonable time has elapsed; in the present case a reasonable time had not elapsed. [He also cited *Jenner's Case*. (1)]

J. A. Hamilton, K.C., and *F. W. Sherwood* (*Barrington* with them), for the defendants. Sect. 3 of the Companies Act, 1900, has no application to such a case as the present. It is suggested that the plaintiff ceased under that section to be a director on April 19 because two months had then elapsed since his appointment as director, and he had not obtained the qualification which only became necessary on that very day. It cannot be that a director who has for years held the proper qualification vacates his office eo instanti on a fresh qualification becoming necessary. There is ample evidence of an agreement on the plaintiff's part to take the 200 shares necessary to give him the enlarged qualification. The plaintiff's conduct amounted at least to an offer to take the shares from the company unless he got them aliunde, which he was at liberty to do until acceptance of his offer by the company. As a director in fact at the date when his name was put on the register of shareholders, the plaintiff is estopped from denying that it was put on in the ordinary course of business, and the fact of its being there is primâ facie evidence of a contract by the plaintiff to take the shares. By s. 10 of the Companies Act, 1900, the prospectus must shew on its face who are the directors of the company, and after the plaintiff had on April 22 signed the prospectus shewing him to be then a director he could not get rid of his obligation to hold the qualifying number of shares by resigning his office. There may be a complete contract to qualify within a reasonable time: *Hutchinson's Case* (1); and what is a reasonable time is a question of fact in each case: *Lord Inchiquin's Case* (2), per Bowen L.J. In the present case a reasonable time had elapsed on the day when the plaintiff acted as a director with the enlarged qualification by signing the prospectus, and the continuance by the company of his name on the register amounted to an acceptance by the company of his offer to take the qualifying shares from them.

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(1) (1877) 7 Ch. D. 132.

[They also cited *Hamley's Case* (3); *Leeke's Case*. (4)]

Disturnal, in reply.

Cur. adv. vult.

July 21. The written judgment of the Court (Collins M.R., Mathew and Cozens-Hardy L.JJ.) was delivered by

COZENS-HARDY L.J. [The Lord Justice, after stating the facts as above, proceeded:—] It has been contended with great ability on behalf of the plaintiff that he is not liable (1.) by reason of the provisions of s. 3 of the Companies Act, 1900, and (2.) because he never agreed to take those 200 shares from the company, or to become a member in respect of them. It will be convenient to deal with these points separately.

First, s. 3 of the Act of 1900 is as follows: [The learned judge read the section.]

It is argued that the plaintiff ceased to hold his qualification on April 19, when the qualification was raised from 50*l.* to 250*l.*, and that thereupon he necessarily vacated office, and that no subsequent acts on his part purporting to be done as director can afford ground for raising the implication of a contract to take qualifying shares. But on a careful consideration of the language of the section, it seems to us that this argument cannot prevail. Sub-s. 1 deals with the original appointment of a director, and states that it is his duty to obtain the "specified share qualification" within two months after his appointment at the latest. This could not apply to the plaintiff, who was appointed in May, 1899, for the Act did not come into operation until January 1, 1901. Sub-s. 2 states the consequences of a breach of the duty referred to in sub-s. 1. It provides that the office of director shall be vacated if a director does not within the prescribed period obtain his qualification (i.e., the specified share qualification), "or if after the expiration of such period or shorter time he ceases at any time to hold his qualification." These last words plainly contemplate that the director once had, but no longer has, the specified share qualification. It is an abuse of language to say that the plaintiff "ceased" to hold 250 shares on April 19. The section does not touch a case like the present where, after election, the share qualification has been raised. The opposite view would lead to the strange result that a prosperous company increasing its capital, and also the qualification of its directors, might find that the passing of the special resolution instantaneously vacated the office of every director, and left the company without any executive. Neither the language nor the policy of the Act compels us to arrive at this conclusion. The case must, therefore, be decided apart from s. 3 of the Act of 1900.

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(1) [1895] 1 Ch. 226.

(2) [1891] 3 Ch. 28.

(3) (1877) 5 Ch. D. 705.

(4) (1871) L. R. 6 Ch. 469.

On principle, and apart from authority, it seems to us that a person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, and acts as director, must be held to have contracted with the company that he will, within a reasonable time, obtain the requisite shares either by transfer from existing shareholders or directly from the company. If he has not obtained the shares within a reasonable time from the public, the company are authorized to put him on the register in respect of the shares. What is a reasonable time must depend upon all the circumstances. As a general rule, and apart from any special provisions in the articles, the qualification ought, in the case of an established company, to be obtained before acting. Where a director takes an active part in the scheme for increasing the qualification, the reasonable time may well begin to run before the date of the second or confirmatory resolution, and may be held to have ended at the latest on the

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first occasion when he does an important act as director after that date. The articles, though not themselves a contract between the company and the director, must be regarded as shewing the terms upon which on the one hand he agrees to act as director, and on the other hand the company agree to pay him remuneration for his services. By s. 37 of the Companies Act, 1862, the register is primâ facie evidence that a person on the register is a member in respect of shares registered in his name. His position is not the same as it would be if his name were not on the register, and the liquidator were seeking to make him a contributory. Moreover, he is absolutely bound as a member under s. 23, if it can be shewn that he has "agreed," expressly or by implication, "to become a member" in respect of the shares which are registered in his name. The conditions of s. 23 are satisfied if the reasonable time has elapsed without his having obtained the shares aliunde. The authorities in the Court of Appeal are consistent with the above propositions; we refer especially to *Brown's Case* (1); *Lord Inchiquin's Case* (2); *Isaacs' Case* (3); *Cammell's Case.* (4)

Applying these principles, we think the plaintiff was bound to have acquired his qualification before signing the prospectus of April 22. This was a statutory duty imposed upon him as director by s. 9, sub-s. 2, of the Act of 1900. It was a solemn assertion that he was a duly qualified director. He was so if, but only if, the insertion of his name on the register on the 20th can be deemed authorized. True it was the act of the manager and secretary. But it was ratified and adopted by the board at any rate on May 22 by making a call on the plaintiff in respect of these particular shares: *In re Portuguese Consolidated Copper Mines, Limited.* (5) It is of no moment that the plaintiff was not aware at the time that his name had been placed on the register.

We ought perhaps to allude to an argument which was strongly pressed upon us as to the effect of the resignation on

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(1) L. R. 9 Ch. 102.

(2) [1891] 3 Ch. 28.

(3) [1892] 2 Ch. 158.

(4) [1894] 1 Ch. 528; [1894] 2 Ch. 392.

(5) (1890) 45 Ch. D. 16.

May 16. If, as we hold, there was a binding contract prior to that date, the plaintiff could not, by his own sole act, release himself from its obligation. Nor is there any ground for holding that there was an implied condition in the contract that he might thus release himself.

It follows that we consider Phillimore J.'s judgment on the counter-claim was correct, and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *James Mitchell, for R. A. Willcock & Taylor, Wolverhampton.*

Solicitor for defendants: *Harvey Clifton.*

W. J. B.

[IN THE COURT OF APPEAL.]

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1902
July 16, 17, 29.

NEW RIVER COMPANY *v.* HERTFORD UNION.

Rate—Poor-rate—Waterworks—Indirectly productive Works—Right to take Water from River—Assessment of Intake.

A waterworks company acquired by statute the right to take water from a river upon payment to the conservators of the river of certain sums of money. In exercise of that right they received a flow of water from the river over a piece of land on the river bank in their occupation called an "intake," where the water was measured by a gauge:—

Held, that in rating the company to the relief of the poor, the intake ought, beyond its structural value and its value as land, to be rated in an additional sum as having an enhanced value by reason of its fitness for the user made of it in taking water from the river into the channel of the company; but that the statutory payments made to the conservators of the river for the water were not an element to be considered in arriving at the rateable value.

APPEAL from the decision of the Divisional Court upon a case stated by the quarter sessions for the Hertford division of the county of Hertford upon an appeal against a poor-rate. (1)

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(1) [1901] 2 K. B. 620.

1. The history of the appellant company (1) and of their right to take water from the river Lea is contained in their charter and in the following statutes, which form part of this case:—

3 Jac. 1, c. 18.

12 Geo. 2, c. 32.

The Lea Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix.).

The River Lea Water Act, 1855 (18 & 19 Vict. c. cxcvi.).

The Lea Conservancy Act, 1868 (31 & 32 Vict. c. cliv.).

The Lea Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.).

2. Shortly stated, the facts appearing from the charter and statutes are as follows:—

3. The appellant company were formed under a charter granted in 1618 by King James I. for the purpose of bringing water from certain springs at Chadwell and Amwell, in the county of Hertford, to London.

4. For many years prior to the year 1738 the appellants had taken considerable quantities of water out of the river Lea, the point of intake being at a place called Chalk Island, in a channel of the river Lea called the Manifold Ditch, from which the water so taken flowed by means of an artificial cutting into the New River.

5. In the year 1738, by the statute 12 Geo. 2, c. 32, s. 5, the appellants were permitted to take a specified quantity of water from the river Lea through the Manifold Ditch, and the Manifold Ditch and the water running through it were by s. 11 vested in the appellants, who were directed by s. 17 to pay to the trustees appointed to carry out the Act two capital sums amounting to 3250*l.*, and two annual sums amounting to 350*l.* All those sums were by s. 18 to be applied to purposes relating to the navigation and purity of the water of the river Lea and the costs of passing the Act. The company were also required by s. 3 to keep in repair the lock near the Ware Mills.

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(1) The terms "appellants" and "appellant company" are used throughout this statement with regard to the position of the parties at quarter sessions.

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6. In 1850 the statute 13 & 14 Vict. c. cix. gave the trustees of the river Lea the right to sell surplus water from the river Lea to certain water companies, and the appellants for three years made an annual payment of 1500*l.* for water so purchased by them and supplied at an intake near Tottenham, in the county of Middlesex. The said intake has not been used since the year 1855, but it might still be used.

7. In 1855, by the statute 18 & 19 Vict. c. cxcvi. ss. 4 and 5, the annual payments under the above-mentioned statutes ceased, and in lieu thereof an annual sum of 1500*l.* and a capital sum of 42,000*l.* were directed to be paid by the appellants. In return for the said payments, and other payments to be made by the East London Waterworks Company, this statute, by s. 9, vested in the appellants and the East London Waterworks Company all the water flowing in the river Lea except so much as was required for navigation. The trustees of the river Lea were by s. 43 directed to expend 30,000*l.* of the said capital sum of 42,000*l.* in specified improvements relating to the navigation of that river. The Act contained provisions for the regulation of the quantity of the water to be taken by the appellants from the river Lea through the Manifold Ditch, and required the appellants to construct a new gauge, which gauge, with a house or building to contain the same with the requisite machinery, was erected by the appellants in or about the year 1859 near the point of intake.

8. In 1868, by the statute 31 & 32 Vict. c. cliv., the appellants were directed by s. 103 to pay the annual sum of 600*l.* to the corporation of Hertford, and by s. 131 the appellants and the East London Waterworks Company were directed to pay an additional aggregate yearly sum not exceeding 1000*l.*, of which the appellants were to pay one-third, to the conservators of the river Lea (who by that Act became the successors of the said trustees) for purposes therein specified relating to the purity of the water of the river Lea.

9. Since the year 1868 the appellants have paid to the conservators of the river Lea under the said statutes an annual sum of 1833*l.* 6*s.* 8*d.*, and have paid to the corporation of Hertford an annual sum of 600*l.*

10. By the Lea Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.), s. 25, from and after January 1, 1901, the aggregate yearly sum payable by the appellants and the East London Waterworks Company under s. 5 of the Act of 1855 (referred to in paragraph 7) was increased to 8000*l.*, of which 3750*l.* was to be paid by the appellants, and from and after the same date the additional aggregate yearly sum payable by the two companies under s. 131 of the Act of 1868 (referred to in paragraph 8) was increased to 2000*l.*, and that section was to be read and construed accordingly.

11. The parish of St. John Urban, in respect of which the rate in question was made, was formed under the Local Government Act, 1894, and comprised a portion of the previously existing parish of St. John, Hertford (the part within the borough of Hertford), and in addition thereto a part of the liberty of Little Amwell (such part as was within the borough aforesaid).

12. From 1876 to 1894 the appellants' property in the said parish of St. John was rated at 350*l.*, and in the said liberty of Little Amwell at 500*l.*, and those figures had not been materially altered since 1859.

13. Upon the new parish of St. John Urban being formed, the property of the appellants therein was rated at 350*l.* in respect of that portion which was in the parish of St. John, and at 300*l.* in respect of that portion which was taken from the old liberty of Little Amwell. The portion left in the old liberty of Little Amwell was rated at 200*l.* The rating of the property of the appellants in the new parish of St. John Urban, therefore, stood at the same valuation as in 1876.

14. Until January, 1900, the said property of the appellants in the parish of St. John Urban had never been assessed at more than 650*l.* rateable value.

15. In January, 1900, by a supplemental valuation list, subsequently confirmed by the assessment committee, a further sum of 3180*l.* was added to the rateable value in the assessment of the said property in the occupation of the appellants, under an entry in which they were rated for property described as "intake from the river Lea." On May 24, 1900, the rate in

question was made in accordance with the said supplemental valuation list. The following is a copy of the rate:—

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Estimated Extent.	Gross Estimated Rental.	Rateable Value of Buildings, &c.	Amount of Rate at 1s. 2½*d.* in the £ on Agricultural Land, and 2s. 5*d.* in the £ on other hereditaments.
					A. R. P.	£	£	£ *s.* *d.*
132	New River Company.	New River Company.	Chadwell Spring. Portion of the New River. Gauge House. Sluice and appurtenances.	Kings Meads.	5 2 38	787	650	78 10 10
653	New River Company.	New River Company.	Intake from River Lea.	Kings Meads.	..	3280	3180	384 5 0

16. The appellants duly appealed against the rate. The grounds of their appeal, so far as they are material to this case, were:—

(1.) That they were overrated.

(2.) That they did not occupy any rateable hereditament in the parish coming within the description of intake from the river Lea.

(3.) That no rateable hereditament coming within that description had any existence in the parish.

17. The appeal came on for hearing on October 15, 1900, when the above-stated facts were proved or admitted.

18. It was further proved and admitted that the said sum of 3180*l.* was arrived at by the professional valuer, who made the said supplemental valuation list, by taking 4 per cent. upon the capital sum of 42,000*l.* (namely, 1680*l.*), and the annual sum of 1500*l.* directed to be paid under the above-mentioned statute of 1855; but the respondents admitted that, although those sums might be primâ facie evidence, they were not necessarily the measure of rateable value.

19. It was also proved that the actual intake from the river Lea consisted of a certain structure with the land on which it stands; that the appellants had put a grating across the mouth or opening of the Manifold Ditch, where water issues from the river, to prevent timber and other things from floating into the intake, and that they had erected posts in the bed of the river to protect the intake, and that they were in occupation of the said posts, and that in and by the item of 650*l.* the intake, grating, and posts were rated at their full structural value; that the area of the said land was about three poles, and that its annual value as land (apart from its user as an intake) did not exceed 5*l.*, which was also included in the said sum of 650*l.* It is at this point that the specified quantity of water which the appellants are authorized to take from the river Lea enters the Manifold Ditch and flows thence into the New River.

20. For the respondents it was contended—

(1.) That beyond the rating of the intake at its structural value and value as land it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it by taking water from the river Lea into the channel of the appellants.

(2.) That the sums of money which the appellants had paid under the said statutes were evidence that the land and the structure erected thereon had some additional value beyond the structural value thereof in respect of the user made of them as aforesaid, and that such additional value was sufficiently great to support the rate appealed against.

(3.) That the additional payments directed by s. 25 of the Lea Conservancy Act, 1900, were evidence to shew what (in the opinion of Parliament at the date of the passing of that Act) the user of the intake was worth to the appellants.

21. The appellants contended—

(1.) That all the rateable property of the appellants in the parish was already rated in the item 650*l.*

(2.) That no addition ought to be made to the said assessment of 650*l.* in respect of the water flowing over the intake, or of the user of the intake by such water flowing over it.

(3.) That the intake ought not to be assessed upon or with reference to the moneys represented by the item 3180*l.*, which were paid by the appellants for the purchase of water and the right to divert water from and control the water in the river Lea, or with reference to the sums payable under the Act of 1900.

22. The quarter sessions dismissed the appeal.

23. The question for the Court was whether the said hereditament was rateable upon the principle contended for by the respondents. If so, the judgment was to stand; if not, then either the gross and rateable values were to be reduced respectively to the sums of 787*l.* and 650*l.*, or the Court was to make such other order as it should think just.

The Divisional Court (Ridley and Bigham JJ.) allowed the appeal, and directed the assessment to be reduced to the former figures. (1) The assessment committee now appealed from that decision.

Balfour Browne, K.C., and *Ryde* (*Danckwerts, K.C.*, with them), for the assessment committee. The Divisional Court was wrong in holding that the intake could only be rated at its value as land together with its structural value. Structural value is not the proper test to apply, for to have regard to that alone is to value the intake and building upon it as a mere house, without regard to its user as a means of getting the water into the channel of the New River Company. The right to take the water through the intake must be considered as enhancing the value of the company's property in the particular parish in the same manner as in *Rex* v. *New River Co.* (1) the presence of a spring upon the land was held to enhance the value of the land for the purposes of assessment, although no profits were received from the spring in the particular parish in which it rose. The only test that can be applied is what the hypothetical tenant would give for the property. There cannot be a doubt that where, as in the present case, there is a right vested in the occupier of land to use it in a special way which would induce him to give a higher rent for the land than he would otherwise give, the right must be taken into account in arriving at the rateable value.

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(1) [1901] 2 K. B. 620.

[COLLINS M.R. Are the company occupiers of the land where the intake is, apart from the house?]

Yes; that appears from 12 Geo. 2, c. 32, s. 11, and from paragraph 19 of the case. It is conceded that if this were a right in gross apart from the occupation of land, it would be impossible to bring it within the rating statutes. The right is in effect to demolish part of the bank of the river Lea so as to let the water run into the New River. The case of *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (2) is a strong authority in favour of the assessment committee. There the corporation were empowered to construct a reservoir, which involved the submersion of the sites of a parish church, vicarage, and schools, and were required to erect a new church, &c., in substitution; it was held that in estimating the capital value of the reservoir for the purpose of arriving at its rateable value the amounts expended in providing the new church, &c., ought to be included as being part of the capital cost of the works. That is practically the same case as the present; there can be no difference between putting up a dam so as to

(1) (1813) 1 M. & S. 503; 14 R. R. 514.

(2) [1899] 2 Q. B. 14.

make a reservoir and making a cut to let the water out; in the one case the water authority are occupiers of the dam, in the other they are occupiers of the opening in the bank through which the water flows. The case is precisely similar to that of a licence to sell intoxicating liquors, which is an element in the rateable value of the house where the liquor is sold; it is true that the company are not compelled to take the water at an intake in this particular spot, but wherever the intake might be moved to it would be rateable, and its value would equally be enhanced by the right to get the water at the particular locality.

[They also cited *Reg.* v. *Grand Junction Railway* (1); *Reg.* v. *Mile End Old Town Overseers* (2); *Reg.* v. *West Middlesex Waterworks Co.* (3); *Cartwright* v. *Sculcoates Union* (4); *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.* (5)]

Marshall, K.C., and *R. D. Muir*, for the New River Company. It is admitted that the rateable value of the intake must be arrived at in the ordinary way by determining what rent a hypothetical tenant would give for it; it is not contended that the assessment must be confined to the agricultural value of the land plus the structural value, although structural value, as appears from the judgment of A. L. Smith L.J. in *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (6), is an important element for consideration where, as in the present case, no profits are earned in the parish by the use of the hereditament. The rental should be ascertained in the same way that, if the water were taken by pipes from the river Lea, the rental of the pipes would be determined. But in holding that something should be added to the rateable value in respect of the actual user made of the hereditament the assessment committee went upon a wrong principle. When once the value of the hereditament is arrived at by the ordinary method, its value for rating purposes is exhausted; the rateable value of a house cannot be increased by reason of the mode of

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(1) (1844) 4 Q. B. 18.
(2) (1847) 10 Q. B. 208.
(3) (1859) 1 E. & E. 716.
(4) [1900] A. C. 150.
(5) [1901] A. C. 175.
(6) [1899] 2 Q. B. 14.

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user of the house. The assessment committee have gone far beyond the principle laid down in *Reg.* v. *Mile End Old Town Overseers* (1) and *Reg.* v. *West Middlesex Waterworks Co.* (2), that the parts indirectly conducing to produce profit are to be rated as mere land and buildings, &c., with some additional value from their capacity of being applied to such purposes as those of a water company. In *Talargoch Lead Mining Co.* v. *St. Asaph Union* (3), where a stream was diverted for the purpose of working the machinery of a mine a mile and a half distant, it was no doubt held that the occupiers of the watercourse were rateable in respect of the value of the land enhanced by its capability of conveying water; but it was also held that the money paid for the diversion of the water was not to be taken into consideration for the purpose of augmenting the assessment, and that to measure the rateable value by the amount paid for the diversion would be to proceed upon a wrong basis; that is precisely what has been done in the present case, for the 42,000*l.* (upon which 4 per cent. was allowed by the valuer) was really money paid for the diversion of the water from the river Lea.

The case is not similar to that of the spring (*Rex* v. *New River Co.* (4)), for the profits of a spring are part of the produce of the land on which the spring rises: *Rex* v. *Miller* (5); and such a case is similar to that of a cornfield: per Grose J. in *Rex* v. *New River Co.* (6); but water passing over an intake cannot be part of the produce of the land, for the intake is a mere passage by which the water passes out of one channel and into another. Nor is there any similarity to the case of a licensed house; it is substantially the house that is licensed, and there is a monopoly growing out of the occupation of the house which must be considered in determining what rent the house would fetch.

[They also cited *Rex* v. *Coke* (7); *Rex* v. *Foleshill.* (8)]

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(1) 10 Q. B. 208.

(2) 1 E. & E. 716.

(3) (1868) L. R. 3 Q. B. 478.

(4) 1 M. & S. 503; 14 R. R. 514.

(5) (1777) Cowp. 619.

(6) 1 M. & S. at p. 510; 14 R. R. at p. 517.

(7) (1826) 5 B. & C. 797; 29 R. R. 408.

(8) (1835) 2 A. & E. 593; 41 R. R. 484.

Danckwerts, K.C., in reply. The only question for quarter sessions was what rent a hypothetical tenant from year to year would give, bearing in mind that the intake forms, and will continue to form, an integral part of the enterprise of the company. The flow of water is annexed to the occupation of the intake, and the case is the same as though the whole of the water sprung up in a spring on the land. The annual payments made by the New River Company under s. 25 of the Lea Conservancy Act, 1900, are some evidence of rental value, and may properly be taken into consideration in arriving at the rent for this piece of land enhanced by these advantages. In any event the view of the Divisional Court that structural value was the proper basis of the assessment was wrong. [He also cited *Rex* v. *Bradford* (1); *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (2); *Reg.* v. *London and North Western Ry. Co.* (3); *Mersey Docks and Harbour Board* v. *Llaneilian Overseers* (4); *North and South Western Junction Ry. Co.* v. *Brentford Union.* (5)]

Cur. adv. vult.

Collins M.R. read the following judgment:—This is an appeal from the Divisional Court reversing the decision of quarter sessions on a case stated by them. The question raised is on what principle ought the intake, by means of which water passes from the river Lea on to the New River system, to be rated. That the intake is a rateable hereditament in the occupation of the New River Company, though disputed before the assessment committee, is not now in controversy, nor can it be questioned that water passes through it in quantities measured by proper appliances on to the New River system. The real question, it seems to me, between the parties is formulated by the New River Company in paragraph 21, sub-s. 2, of the case, and answered by the assessment committee in paragraph 20, sub-s. 1. Those paragraphs are respectively as follows. For the company: "That no addition ought to be made to the said assessment of 650*l.* in respect of the water flowing over the said intake, or of the user of the intake by such water flowing over it." For the assessment committee: "That beyond the rating of the intake at its structural value and value as land it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it by taking water from the river Lea into the channel of the appellant company." The case is, however, complicated by additional contentions formulated by each side respectively, while the quarter sessions have stated the question to be whether the said hereditament is rateable on "the principle" contended for by the respondents, i.e., the assessment committee. If the quarter sessions mean by "the principle" above mentioned that which I have set out above as formulated in the first paragraph of the assessment committee's contentions, I should feel no hesitation in adopting it. I think it is right, and the counter contention of the New River Company wrong. The authorities appear to me to be quite clear on this point. The New River Company has by statute a very valuable right of appropriating water drawn from the river Lea. It is absolutely necessary for them to get access to the river Lea in order to appropriate that water in the given quantities, and the point at which they take it is fixed by statute, and is presumably the point best adapted to their needs. The land which they occupy for the purpose of securing and passing the water into their system must have an added value by reason of its special fitness for this purpose. If it were the only spot over which they could carry out the diversion and thus achieve the enjoyment of the valuable right conferred upon them, they would obviously be prepared to pay a high rent for its use, and a rate which ignored this element of value would be obviously wrong. This is one of the commonplaces of rating law, and it is not necessary to refer to authorities upon it. It is repeated in many cases, and is laid down in express terms in the case so much relied upon by the now respondents: *Talargoch* v. *St. Asaph.* (1) So much for what seems to be the main point in the case before us.

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(1) (1815) 4 M. & S. 317.
(2) (1863) 4 B. & S. 135.
(3) (1874) L. R. 9 Q. B. 134.
(4) (1884) 14 Q. B. D. 770.
(5) (1888) 13 App. Cas. 592.

(1) L. R. 3 Q. B. 478.

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There remains, however, the complication to which I have referred and which is introduced by other findings. As appears by the case, large sums have been exacted by successive Acts of Parliament from the New River Company, presumably in return for the privileges conferred upon them. Now it is quite clear that no sum paid for a privilege not annexed to the land proposed to be rated ought to come into the discussion. The case just cited is a clear authority that a sum of money paid for the privilege of diverting a stream is not an element in arriving at the rateable value of the channel into which it is diverted. It is easy to give illustrations shewing that this must be right in principle. Suppose a person buys the right to take and carry away all the gold in a given area, and suppose he is obliged to occupy other land in order to reach and carry away the gold: could the price paid for the right to get the gold be any element in measuring the rateable value of the land used and occupied as a means of access? Suppose the gradients were such that the ore could be rolled down by its own weight on a tramway across the land so occupied: the price paid for the right to get the gold could not enter into the rating of the tramway, though the value of the privilege would affect the price which the owner would give for the means of access. It was contended for the appellants that the principle of the *Amwell Spring Case* (1) applied to this case, and that water let in laterally by gravitation under the provisions of a statute was just as much an element in the rateable value of the hereditament as water welling up to the surface by the operation of natural laws. But suppose the occupier of adjoining land had bought from the occupier of the land on which the Amwell Spring comes to the surface the right to carry it across the land of the purchaser and sell it, would the rateable value of this latter land be measured by reference to the price paid by its occupier for the water? Clearly not, though the land would get an additional value so far as it furnished a convenient channel for carrying the water to its market. The right of the New River Company here is merely to occupy land suitable for the convenient appropriation of something which is in no sense a part of, or annexed to, the land occupied, and the sum paid as the price of the water can have no direct bearing on the rateable value of the land occupied for the purpose of most conveniently appropriating it.

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(1) *Rex* v. *New River Co.*, 1 M. & S. 503; 14 R. R. 514.

The sessions, as I have said, have formulated the question as being whether the hereditament is rateable on "the principle stated by the respondents," and if that principle is to be found in the passage which I have cited I think it is sound. But the contention of the respondents is to be found in three paragraphs, of which it is the first, and if all three are meant as expressing "the principle," then I think that, though the payments made were in part intended to cover elements of rateable value, there is ground for supposing that the sessions have approved the view that the price paid for the water itself is a factor in assessing the rateable value of the hereditament. The respondents' second and third contentions are as follows: "(2.) That the sums of money which the appellant company had paid under the said statutes were evidence that the land and the structure erected thereon had some additional value beyond the structural value thereof in respect of the user made of them as aforesaid, and that such additional value was sufficiently great to support the rate appealed against. (3.) That the additional payments directed by s. 25 of the Lea Conservancy Act, 1900, were evidence to shew what (in the opinion of Parliament at the date of the passing of that Act) the user of the intake was worth to the appellant company."

The second contention perhaps does not travel outside the true principle, but I think the third undoubtedly does, and, having regard to the statement in paragraph 18 of how the figures in the rateable value were arrived at, it seems probable that an inadmissible element was introduced into the calculation. As far as I can follow the reasoning of the Divisional Court, they seem to have proceeded on the basis of structural value only, adopting absolutely the second contention of the New River Company that "no addition ought to be made to the assessment in respect of the water flowing over the intake or of the user of the intake by such water flowing over it," on the ground, apparently, that this element formed no part of the structural value. For the reasons I have already given I cannot concur with this view. I think the standard of structural value is not the true one to apply to such a case. There is an added element of value in this case by reason of the special fitness of the land and structure for a particular profitable purpose. I think the case must go back to the sessions for rehearing and determination in view of our opinion.

Mathew L.J. read the following written judgment:—I agree that the case must go back to the Court of quarter sessions for rehearing. The assessment committee and the Court of quarter sessions appear to have lost sight of the fact that the water diverted from the river Lea was vested in the New River Company. This was provided for by 12 Geo. 2, c. 32, s. 11, and the Act of 1855, s. 9. Under the former Act the quantity to be taken was restricted and provision was made for securing a sufficiency of water for the navigation of the river Lea. For that and other purposes mentioned in the Act the appellant company were directed to pay two capital sums amounting to 3250*l.*, and two annual sums of 350*l.* These sums were not paid for the use of the intake or entrance into the channel between the river Lea and the New River. The channel and the intake had existed and were used long before the Act passed. The ground for taxing the New River Company in this way would seem to be the provision which vested in the New River Company for the purpose of their undertaking the water which they were permitted to take from the river Lea. By the later Act, 18 & 19 Vict. c. cxcvi., the sums which the New River Company were required to pay under the former statute were increased to a capital amount of 42,000*l.* and an annual sum of 1500*l.* The quantity of water to be taken was restricted, and the company were required to construct a new gauge with a house or building to contain it and proper appliances for measuring the water at the intake. Of the 42,000*l.*, 30,000*l.* were to be expended for specified improvements in relation to the river Lea and its navigation.

For some years prior to 1900 the New River gauge house, sluice, and appurtenances were assessed at a sum of 650*l.*,

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which was divided between the parishes in which these different properties of the company were situate. In 1900 the intake from the river Lea was for the first time separately assessed at the sum of 3180*l.* The way in which this assessment was arrived at is stated in paragraph 18 of the case. Four per cent. on the capital sum of 42,000*l.*, namely, 1680*l.*, was added to the annual sum of 1500*l.* directed to be paid under the statute of 1855, and this sum of 3180*l.* was treated —it is not easy to say why—as the amount which the hypothetical tenant would pay for the intake. It was contended in the argument before us that this assessment ought not to be interfered with. It was urged that the value to the New River Company of the water passing into the channel should be taken into account. The intake, it was said, was analogous to the spring in the case in *Rex* v. *New River Co.* (1), and, therefore, the sum of 3180*l.* might properly be treated as the annual value of the water passing over the intake from the river Lea. But the hypothetical tenant would have no right to interfere with the flow of water for any other purpose than that of measurement. The analogy of the spring wholly failed; for the owners of the spring would have no independent right to the water, and the value of the water to them would, therefore, be properly taken into account.

Then it was said that the question was one for the justices, and that where the only objection to the assessment was an excessive valuation the Court could not interfere. But this argument would justify an arbitrary valuation on an estimate of what an owner might exact if he were free to bar the intake and stop the supply of water to the New River Company. But any such mode of assessment is clearly inadmissible. The intake, it seems to me, is like the junction between the lines of two railway companies. The contention of the appellants would lead to this result, that in assessing the point of contact of the two lines the value of the traffic passing to and from either line should be taken into account and form an element in arriving at the assessable value of the junction. This calculation would have the effect of appropriating to a particular parish a large part of the assessable value of the whole undertaking. The justices are bound by well-established rules in making their valuations, and are forbidden to admit as elements of value matters which are not properly assessable. It is the more important in this case that the justices should be reminded of the condition upon which assessments can be properly made, because it would seem that if this valuation be upheld the amount may be increased to the sums which the New River Company are bound to pay under the Act of 1900, s. 25, although those sums are appropriated for the purposes specified in the Act of 1855, and have no relation whatever to the intake.

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(1) 1 M. & S. 503; 14 R. R. 514.

The true mode of assessing the property in question is to ascertain whether the land over which the water of the New River Company passes from the river Lea has an enhanced value in respect of the user made by the appellant company. In other words, whether its fitness for the purpose for which it was used would justify any and what increase of the rent which a tenant might reasonably be required to pay for the access afforded from the river Lea to the New River. It should be borne in mind that the subject-matter of assessment is like an entrance to a property through a gateway. The land occupied by the gate may be held to be made more valuable by the purpose to which it is put. The Court of quarter sessions will be guided by any evidence laid before them, but it would seem that any element of entrance value might be moderate in amount.

Cozens-Hardy L.J. I entirely agree with the judgment of the Master of the Rolls, which I have had the opportunity of reading, and it is unnecessary to do more than express my concurrence.

Appeal allowed. Case remitted to quarter sessions.

Solicitors for New River Company: *Thompson & Debenhams.*

Solicitors for assessment committee: *J. N. Mason & Co., for T. J. Sworder Hertford.*

W. J. B.

Applied. THE ARDENNES. [1950] 2 All E.R. 517.

C. A.
1902
July 29, 30;
Aug. 7.

[IN THE COURT OF APPEAL.]

DUNN AND OTHERS *v.* BUCKNALL BROTHERS.
DUNN AND OTHERS *v.* DONALD CURRIE & CO. AND OTHERS.

Ship—Bill of Lading—Breach of Shipowner's Obligation to Shipper—Carriage of Goods destined for Enemy—Seizure of Ship—Delay in Delivery of Shipper's Goods—Damages—Loss of Market.

The carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers is a breach of duty towards them, and the shipowner is liable for damages for delay in delivering their goods at the port of destination if the ship is seized and detained by reason of having enemies' goods on board.

There is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea.

APPEAL from a judgment of Mathew J. sitting in the Commercial Court without a jury.

The action was brought to recover damages for breach of contract and breach of duty in and about the carriage of goods of the plaintiffs shipped on board the steamer *Mashona*, of which the defendants were joint charterers, at New York for carriage to Algoa Bay, the allegation being that in consequence of the negligence of the defendants or their agents in allowing goods intended for the Queen's enemies in the Transvaal to be shipped on board the *Mashona*, the latter was arrested on arrival at Algoa Bay by H.M.S. *Partridge* and great delay was occasioned in the delivery of the plaintiffs' goods. The following statement of facts is substantially taken from the judgment of Mathew J. in the Court below.

The plaintiffs were shippers of goods by the *Mashona* from New York to ports in South Africa. The action was brought for the loss sustained by the plaintiffs from delay in the delivery of the goods at their destination, which delay was alleged by the plaintiffs to be due to the reckless conduct of the defendants in permitting to be loaded on board enemies' goods which were liable to confiscation. This part of the cargo consisted mainly of bread-stuffs, which it was said were intended for the Boer troops. The ship sailed on November 5, 1899, after war had been declared. The bills of lading of the goods alleged to be intended for the enemy were dated, one on October 17 and the others on November 2. These bills of lading contained a clause, specially drafted, exonerating the ship from risk of capture of enemies' goods. The clause was in the following terms: "As any cargo which may be deemed to be destined for the Transvaal $\frac{\text{and}}{\text{or}}$ Orange Free State is liable to be detained, intercepted, confiscated, $\frac{\text{and}}{\text{or}}$ otherwise restrained in the ports of Cape Colony or Natal, it is agreed by the shipper in accepting this bill of lading that the steamer, her owners, charterers, $\frac{\text{and}}{\text{or}}$ agents are released from all responsibility in respect of goods so detained, intercepted, confiscated, $\frac{\text{and}}{\text{or}}$ otherwise restrained." No such clause appeared in the bills of lading issued to the plaintiffs, which, however, contained an exception of liability for loss or delay occasioned by restraint of princes. The vessel arrived at Algoa Bay on December 5. The bills of lading and the ship's manifest shewed the character and the destination of the goods. The vessel was boarded by an officer of H.M.S. *Partridge*, who examined her manifest and ascertained that her goods were intended for ulterior delivery in the Transvaal. The *Mashona* was arrested and taken to Cape Town by order of the naval authorities. A suit was instituted in the Prize Court at Cape Town for the confiscation of the goods and the condemnation of the ship as aiding, or attempting to aid, trading operations with the enemy, and pending the proceeding the ship was detained from December 5 to the end of the following March. (1) By the judgment of the Prize Court the goods were confiscated. The ship, however, was released; but it was held by the Court that reasonable ground had been shewn for arresting her, and the owners were ordered to pay the costs of the captors, except the cost of bringing the vessel round to Cape Town.

At the trial the defendants contended that they had not been guilty of negligence; but Mathew J. found as a fact that the agents of the ship knew the true character of the goods and the intention with which they were shipped, and their liability to confiscation, and were guilty of negligence and breach of duty to the plaintiffs in permitting them to be put on board the *Mashona*. With respect to damages the learned judge held that, as it was known to the defendants that the object of the plaintiffs' shipment was the supply of the British troops in South Africa, and that the goods would sell at a much higher price if delivered in due course than if delivered at a later date when a large importation of similar goods would have forced prices down, the measure of damages in the case of goods delivered sound was the difference between the market prices when they ought to have been, and when they were, delivered. He further held (and it was not disputed) that the defendants were liable for deterioration to certain of the goods caused by the delay. The defendants appealed.

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(1) It was stated during the argument that the order for the release of the ship on bail was obtained on January 6, and that the subsequent detention of the ship was caused by the delay of the defendants in finding bail.

Sir E. Clarke, K.C., *Scrutton, K.C.*, and *F. D. Mackinnon*, for Donald Currie & Co., and *Carver, K.C.*, and *Lewis Noad*, for Bucknall Brothers. First, the defendants are not liable to the plaintiffs for the delay in delivery of their goods at the port of destination; they are protected by the exception in the bills of lading against loss or damage occasioned by restraint of princes. No contract can be implied on the part of the defendants with the plaintiffs as to the kind of goods which they would or would not carry for other shippers, nor was there any negligence or breach of duty in carrying the goods shipped for the Transvaal. It is not the shipowner's duty to shield the shipper from all chance of delay, and he is under no liability if the cargo he takes on board is a reasonable cargo; there is no breach of duty to one shipper in accepting cargo of another shipper which, though a reasonable cargo in itself, may in the result prove dangerous. The case is in no way analogous to a case of liability arising from the shipment of dangerous goods, which class of liability is itself confined to the putting of goods on board which cause actual physical injury to other goods carried in the same ship: *Hayn* v. *Culliford* (1); that is in fact the ground on which Bramwell L.J. based his judgment in that case.

[COZENS-HARDY L.J. That only applies to the second part of his judgment, where he assumes that there was no contract.]

Even if the defendants can be held to be affected with knowledge of the destination of the goods, it must be assumed in their favour that they did not intend to deliver them to the enemy without the licence of the British authorities, and that being their intention, the carriage of the goods was not an illegal act: *The Mercurius* (2); *The Minna.* (3) The defendants might reasonably suppose that the ship, though containing cargo for the enemy, would, as in previous instances, be allowed to proceed on giving a bond for its discharge into the hands of the British authorities. There being no breach of duty, the benefit of the exception of liability arising from restraint of princes is not taken away.

As to damages: where goods are lost, it is not unreasonable to fix their value at the time and place for performance of the contract; but wholly different considerations apply in the case of delay. Damages for loss of market are not recoverable in the case of delay in carriage by sea; the shipper is entitled only to interest on the value of the goods from the date when they should have been delivered down to the date of actual delivery. The whole question of damages for loss of market was considered in *The Parana* (4), and determined adversely to the shipper; that decision was approved and followed in *The Notting Hill* (5), and is binding. In any event, it was not a natural consequence of any default of the defendants that a British officer should unnecessarily take the vessel to Cape Town, and the defendants are not liable for delay so occasioned. There was no evidence to support the finding of the learned judge that the defendants knew the purpose for which the plaintiffs' goods were shipped.

(1) (1879) 4 C. P. D. 182.

(2) (1808) Edw. Adm. Rep. 53.

(3) (1807) Edw. Adm. Rep. 55, n.

(4) (1877) 2 P. D. 118.

(5) (1884) 9 P. D. 105.

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[They also cited *British Columbia Sawmill Co.* v. *Nettleship* (1); *The Xantho* (2); *Steinman* v. *Angier Line* (3); Mayne on Damages, 6th ed. pp. 30, 312.]

Asquith, K.C., *R. M. Bray, K.C.*, and *Hollams*, for the plaintiffs. The judgment is right upon both points. The learned judge has found as a fact that the agents of the defendants at New York knew the character of the goods there shipped and the purpose for which they were shipped, and the defendants are clearly liable to the plaintiffs for delay in the delivery of the plaintiffs' goods caused by other goods having been knowingly shipped on the same vessel, which were liable to seizure as being destined for the use of alien enemies. That liability may be regarded as arising either in contract or in tort. The contract of carriage was a contract to carry and deliver with reasonable despatch, the only relevant exception in the contract being an exception of liability for damage occasioned by restraint of princes; but an exception in the bill of lading cannot be relied on where the shipowner has himself brought the peril into existence, or by his conduct has increased it: *Notara* v. *Henderson*. (4) Or the case may be regarded as a breach of an implied warranty of seaworthiness; the ship would be impliedly warranted to be reasonably fit to encounter the incidents of the voyage, and as it started on its voyage after a state of war had come into existence, the warranty was broken by putting on board cargo which was liable to seizure because it was going to a hostile country. Again, the facts shew a liability in tort arising from breach of duty, for the cargo entrusted by the plaintiffs to the defendants was put by the latter in such a situation that it became liable to seizure by the British Government: in this point of view the case is similar to that of damage to goods caused by negligently stowing dangerous goods on the same ship, as in *Hayn* v. *Culliford*. (5) The breach of contract or of duty took place as soon as the plaintiffs' goods and the contraband goods left New York in the same ship, for the ship was liable to arrest wherever it might be met on the high seas. As to the suggestion that the defendants are not liable for the delay caused by the removal of the ship to Cape Town, the removal was in no sense wrongful, and, even if it were not strictly necessary, the loss of the defendants cannot be limited by what the most reasonable naval officer would have done; besides, the order for release of the ship at Cape Town was in fact obtained on January 6, and the rest of the delay was caused by the defendants neglecting to comply with the requirements of the Prize Court as to giving security.

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(1) (1868) L. R. 3 C. P. 499.
(2) (1887) 12 App. Cas. 503.
(3) [1891] 1 Q. B. 619.
(4) (1872) L. R. 7 Q. B. 225.
(5) 4 C. P. D. 182.

As to the question of damages, they should be measured by the market value of the goods at the port of destination at the time when they should have arrived, which is clearly the measure of damages where goods are lost through the shipowner's negligence: *Rodocanachi* v. *Milburn* (1); and there is no reason why damage arising from delay in delivery should be calculated on a different basis. It is not correct to say that damages cannot be recovered for loss of market on a contract of carriage by sea, and the case of *The Parana* (2) is not an authority to that effect. In that case Mellish L.J., in delivering the judgment of the Court, says that, if it is known to both parties that goods will sell at a better price if they arrive at one time than if they arrive at a later time, it may be a ground for giving damages for their arriving too late and selling for a lower sum; and it is obvious that in such a case as the present he would have held that the ordinary rule as to damage for loss of market prevailed.

Carver, K.C., in reply.

Cur. adv. vult.

Aug. 7. The written judgment of the Court (Collins M.R., Stirling L.J., and Cozens-Hardy L.J.) was delivered by

COLLINS M.R. This is an appeal from the decision of Mathew J. in favour of the plaintiffs, who claimed damages from the defendants for delay in the delivery of goods shipped by the plaintiffs on the defendants' steamship *Mashona* for carriage to Algoa Bay. The bills of lading under which these

(1) (1886) 18 Q. B. D. 67.

(2) 2 P. D. 118.

goods were shipped excepted liability for loss or damage occasioned by restraint of princes. The ship sailed from New York with the plaintiffs' goods on board shortly after the outbreak of war with the Transvaal. On her arrival at Algoa Bay she was arrested by H.M.S. *Partridge*, when it was found that she contained goods consigned, if not to the Transvaal Government, certainly to residents in the Transvaal. The ship was accordingly taken to Table Bay, and the case was brought before the Prize Court, who condemned the goods, but released the ship, ordering the owners to pay the costs of the captors, save those of bringing the ship round from Algoa Bay, holding that "there was reasonable and probable cause for seizing the ship; that there was certainly carelessness in taking the cargo on board at New York; and though the intention was perhaps not to have landed them without consent of the proper authorities, still the ship had the goods on board." In consequence of these proceedings the delivery of the plaintiffs' goods was delayed by several months. The learned judge has held them entitled to damages based on the difference of the market value at the time they ought to have been delivered in ordinary course and the time at which they were in fact delivered. The defendants deny liability altogether, and dispute the measure of damages. Their contention on the first point is that at the time of shipment they had reasonable grounds for supposing that, by arrangements existing at South African ports, ships containing cargo consigned to the enemy would be allowed to proceed on giving a bond in 10,000*l*. for the discharge of such goods into the hands of the British authorities at their ultimate port of destination within British territory; and that their intention in proceeding to Algoa Bay was to report the facts to the British authorities there and act as directed by them—an intention which was defeated by the intervention of the *Partridge* before they had time to carry it out. And they relied on the case of *The Mercurius* (1) in support of this contention. We are of opinion that if such was their real intention (and the Prize Court uses the word "perhaps" in referring to it in the passage above

(1) Edwards' Adm. Rep. 53.

cited), it affords no defence to this action. The Court have found in the passage above cited that there was carelessness at New York, and that there was reasonable and probable cause for seizing the ship. Even if the finding of the Court were not conclusive on this point, in our opinion the course which the defendants took in carrying enemies' goods without the knowledge and consent of the other shippers was a breach of duty towards them, and was in effect to court detention, even if they had a well-founded hope of being able to give such explanations to the authorities as would avoid the condemnation of the ship. They took the risk of escaping detention without consulting the plaintiffs on the matter. They are primâ facie liable to the plaintiffs for late delivery, and can only excuse themselves by the exception. But it is quite clear that they cannot rely upon an exception to excuse them from the consequences of a peril which their own negligence has contributed to bring about. The principle is thus stated in Carver on Carriage by Sea, s. 16: "A shipowner will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them." See also s. 77, citing *The Xantho* (1) and Bowen L.J. in *Steinman* v. *Angier Line.* (2) The converse case of the shipowner's right against the shipper is given by Lord Tenterden as an instance of an unquestionable liability in cap. 7 in his Treatise on Shipping, as quoted by Lord Campbell C.J. in *Brass* v. *Maitland* (3): "The merchant must lade no prohibited or uncustomed goods by which the ship may be subject to detention or forfeiture," and the liability of the shipowner under the express contract of the bill of lading is at least as clear as that implied as resting on the merchant. Here, as pointed out by Mathew J., there can be no doubt as to the conduct of the shipowners. They had taken advice and had caused a clause to be introduced in the bills of lading delivered to the shippers of goods for the Transvaal, pointing to the possibility of detention and excusing themselves from liability. Indeed, the defendants' counsel

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(1) 12 App. Cas. at pp. 510, 515.

(2) [1891] 1 Q. B. 619, at p. 623.

(3) (1856) 26 L. J. (Q.B.) 49, at p. 54.

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contended that, inasmuch as their conduct was deliberate and with a view to carry such cargo to its destination only if the British authorities sanctioned it, the case came within *The Mercurius* (1) and the shipowners were excused. It certainly seems a startling contention that the liability for the consequences of an act, which would attach if the act were done negligently, would be excused if it were shewn that the act was done deliberately. The question whether the conduct of the owners has been such as to justify the condemnation of the ship is quite independent of their responsibility to the shipper for detention brought about by their act, negligent or deliberate. If negligence in not taking all proper precautions to avoid the excepted peril debars them from relying on the exception, how can they better their position by shewing that they deliberately encountered it, even though they had hopes more or less sanguine of avoiding serious detention? They clearly had no right to speculate on possible immunity at the risk of the plaintiffs without consulting them. In our opinion, therefore, on the undisputed facts in this case their liability is clearly established.

The only remaining question is whether the learned judge was wrong in his direction to the referee as to the measure of damages. On this point of the case *The Parana* (2) was strongly relied upon by the appellants as establishing that the plaintiffs could be entitled to nothing more than interest on the value of the goods when they ought in ordinary course to have been landed down to the date of actual delivery, and they contended broadly that damages could not be recovered for loss of market on a voyage by sea. But we do not understand *The Parana* (2) as establishing any such general proposition. There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages, and the consequent uncertainty as to the times of arrival, may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that as a general rule damages for loss of

(1) Edw. Adm. Rep. 53.

(2) 2 P. D. 118.

market by late delivery are not recoverable from the carrier by sea. It is certainly not a rule of law, it is only an inference of fact, that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties. But as the means of sea transit improve, voyages of three and four weeks' duration may be, and are now, accomplished with almost absolute certainty, and the state of the market at the reasonably calculated date of arrival may well be a vital factor present to the minds of both parties at the time of making the contract. Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases. This indeed, if it were not self-evident, would seem to follow from the illustrations given by Mellish L.J. himself in delivering the judgment of the Court of Appeal in *The Parana*. (1) After giving other instances he says (2): "Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum"; and he adds, "but there is in this case no evidence of anything of that kind." Here the learned judge has found as a fact that "it was known to the defendants what the object of the plaintiffs' shipment was, namely, the supply of the British troops, and that the goods would sell at a much higher price if delivered in due course than at a later time when a large importation of similar goods would force prices down." The appellants indeed suggested that evidence was wanting to support these findings; but on the admitted facts it seems to us at most a case of res ipsa loquitur as to the inferences which both parties must have drawn as to the purpose of the shipment and the probable effect of delay in delivery, and, as is well known to practitioners in the Commercial Court, cases are there conducted on the

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(1) 2 P. D. 118.

(2) 2 P. D. at p. 121.

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basis of mutual admissions which do not always appear in the formal record. We are of opinion, therefore, that the judgment of the learned judge was right on all points, and that consequently this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Son, Coward & Hawksley.*

Solicitors for defendants Donald Currie & Co.: *Parker, Garrett & Holman.*

Solicitors for defendants Bucknall Brothers: *W. A. Crump & Son.*

W. J. B.

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Aug. 11.

[IN THE COMMERCIAL COURT.]

CUNARD STEAMSHIP COMPANY, LIMITED *v.* MARTEN.

Insurance (Marine)—Subject-matter of Insurance—Liability of Shipowner under Contract of Carriage—Suing and Labouring Clause—Applicability.

A number of mules exceeding 20,000*l.* in value having been shipped on the plaintiffs' steamship for carriage under a contract which contained no clause exempting the plaintiffs from liability for loss of the mules through the negligence of the plaintiffs' servants, the plaintiffs effected an insurance with the defendant, an underwriter at Lloyd's, to protect them against "liability of any kind" to the owners of the mules up to 20,000*l.* owing to the omission of the negligence clause from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual suing and labouring clause. During the voyage the vessel stranded through the negligence of the plaintiffs' servants, and expenses were incurred by the plaintiffs in saving some of the mules and in attempting to save others which were lost. The plaintiffs sought to recover these expenses, not as a direct loss under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss:—

Held, that the suing and labouring clause was inapplicable to and formed no part of the contract of insurance, and that the plaintiffs were not entitled to recover in the action.

COMMERCIAL CAUSE tried by Walton J. without a jury.

The facts of the case and the arguments of counsel relating to the only question decided by the learned judge sufficiently appear from the judgment.

Pickford, K.C., and *Loehnis*, for the plaintiffs.
Carver, K.C., and *F. D. Mackinnon*, for the defendant.

Cur. adv. vult.

Aug. 11. WALTON J. read the following judgment:—In this case the plaintiffs, the Cunard Steamship Company, are suing the defendant, Mr. Marten, upon a policy of insurance underwritten by him and other underwriters for sums amounting in the whole to 20,000*l.*, of which the sum underwritten by the defendant was 1000*l.* The insurance was effected to protect the plaintiffs as owners of the steamship *Carinthia* against "liability of any kind to owners of mules $\frac{\text{and}}{\text{or}}$ cargo up to 20,000*l.* owing to the omission of the negligence clause in contract $\frac{\text{and}}{\text{or}}$ charterparty $\frac{\text{and}}{\text{or}}$ bill of lading" on a voyage from New Orleans to any ports in South Africa. In this action there is no claim for a direct loss under the policy—that is to say, for any loss which the plaintiffs have suffered by becoming liable to the owners of the mules. I do not think that any question arises as to any cargo other than the mules. Any claim which there may be for any such direct loss is reserved, the plaintiffs at present confining their claim to the amount of certain expenses alleged to have been incurred for the safeguard and recovery of the mules—or, in other words, expenses incurred to avert or reduce the amount of the loss. These expenses are claimed as suing and labouring expenses under the policy. They amount as claimed to 7744*l.*, or a little more than 38 per cent. on 20,000*l.*, the amount of the policy, which, on the defendant's line of 1000*l.*, comes to 387*l.* 4*s.* 2*d.*

The first question in the case, which if decided against the plaintiffs puts an end to this action, is whether the suing and labouring clause (1) in the printed form of the policy has any application to the insurance in question. The *Carinthia* sailed from New Orleans on May 11, 1900, with about 1500 mules on board, which were shipped under a contract made between the plaintiffs and the Admiralty Director of Transports for the conveyance of the mules from New Orleans to Cape Town. The contract contained no negligence clause—that is to say, no clause exempting the plaintiffs from liability for loss of the mules by the negligence of their servants. On May 15, through the negligence of the plaintiffs' servants navigating the vessel, she stranded near Gravois Point in Hayti. Efforts were made to tow the vessel off the rocks, but were unsuccessful, and she eventually broke up. Between 900 and 1000 of the mules were saved and sent on to Cape Town. The expenses in respect of which this action is brought were incurred in the attempt made to tow the vessel off the rocks and in saving the mules which were saved and attempting to save those which were lost. There is no doubt that the plaintiffs are liable to the contractor of the Admiralty for the mules which were lost, and this liability is within the meaning of the policy "owing to the omission of the negligence clause in the contract of affreightment."

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(1) The suing and labouring clause was in the following terms: "And in case of any loss or misfortune, it shall be lawful to the assured, their factors servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured."

The difficulty of determining whether the suing and labouring clause forms part of the contract of insurance in this case arises (as so frequently happens in questions of marine insurance) from the very peculiar way in which contracts of marine insurance are expressed. A printed form which dates back to the eighteenth century is used as the basis of the contract. In this form there are certain blank spaces, in which it is usual to insert a description of the subject-matter of the insurance or of the special kind of indemnity intended to be given by the policy. It not uncommonly happens that the words written into the blank spaces of the form have no connection with the printed words which precede or with those which follow them. In almost all cases certain parts of the printed form have no application to the risk described by the written words. Sometimes it will be found that many even of the special clauses contained in printed slips gummed on to the policy have no possible application to the actual insurance. Cases are not uncommon in which the whole contract is contained in the written definition of the termini of the voyage and a few written words inserted below in some blank space in the form, none of the printed clauses of the form being applicable at all. Such being the well-known course of business in formulating contracts of marine insurance, it is obviously necessary in every case to consider carefully the description of the risk or special kind of indemnity expressed in the written words of the policy in order to ascertain whether any particular clause of the printed form applies to the insurance effected by the policy. It is most unusual to find that the superfluous or inapplicable words have been struck out of the printed form. Applying this to the present case, it is necessary to look at the description of the risk undertaken by the underwriters in order to determine whether that part of the printed form which is called the suing and labouring clause has any application or forms part of the contract. A somewhat similar question had to be decided in *Xenos* v. *Fox*. (1) The question which arose in that case was whether the suing and labouring clause applied to that part of the policy called "the running down clause," by which the underwriters undertake to indemnify the owner of the vessel insured from liability which he may incur to the owners of other vessels with which the vessel insured may be negligently brought into collision. It was held that the suing and labouring clause had no application to such a contract of indemnity contained in a policy on ship. The decision would have been the same if the policy had covered nothing but the risk of liability for collision. I refer to that case only as an illustration, and not as an authority upon which the present case can be decided.

The construction of the policy now in question must depend upon its own language, and cannot be determined by the interpretation of different language in another policy. It is necessary to consider what was the precise character of the risk covered by the policy now sued upon. It was, as I have said, "to cover shipowners' liability of any kind to owners of mules and cargo up to 20,000*l*. owing to the omission of the negligence clause in the contract." I may in passing point out that in a special clause which is, I think, contained in a slip gummed on to the policy, the assured is given "all liberties as per contract of affreightment $\frac{\text{and}}{\text{or}}$ charterparty $\frac{\text{and}}{\text{or}}$ bill or bills of lading new or old including negligence clause." The assured is somewhat specially given liberty to make contracts, including a negligence clause, in a policy which covers nothing but his liability owing to the omission of the negligence clause. Proceeding, however, with the consideration of the words which I have quoted describing the risk covered, there appear to me to be two possible views of the nature of the insurance. It may be an insurance for 20,000*l.* on the mules applying to the plaintiffs' interest as carriers responsible for the safe delivery of the mules. A shipowner who is responsible for the safe delivery of goods carried in his ship has an insurable interest in the goods which he can insure by a policy on goods. *Crowley* v. *Cohen* (1) affords an example of such a policy. If the policy in the present case were to be interpreted as a policy on mules or cargo applying to the shipowners' liability as carrier, one result of such a construction would be that, if the mules or cargo were worth more than 20,000*l.*, the shipowners were not fully covered. The mules were in fact worth considerably more than 20,000*l.*, and the shipowners' total responsibility, therefore, was for a sum considerably in excess of 20,000*l.* Assuming, merely for the purposes of argument, that the total value of the mules and possible liability was 40,000*l.*, the effect of the policy, treating it as a policy on the mules, would be that the shipowners' interest was insured to the extent of one-half only, and, in the case of a loss, whether total or partial, they would be entitled to recover one-half of such loss and no more. If this is the true nature of the insurance, I see no difficulty in applying the suing and labouring clause. It would not be distinguishable for the purposes of this case from an ordinary policy on goods. The plaintiffs, however, do not contend that the policy should be construed in this way as an insurance on goods. They contend that the policy must be read as a contract by which the under-

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(1) (1869) L. R. 4 C. P. 665.

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(1) (1832) 3 B. & Ad. 478; 37 R. R. 472.

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Walton J.

writers agreed to indemnify the plaintiffs against liability of any kind up to 20,000*l.*, which they might incur to the owners of the mules owing to the omission of the negligence clause. The plaintiffs contend that for any loss not exceeding 20,000*l.* they were entitled to recover in full, and for any loss exceeding 20,000*l.* they were entitled to recover 20,000*l.* I think that this is the true construction of the policy, and that to treat it as a policy on goods would not give effect to the plain intention of the parties as expressed in the policy. The present policy is, in my opinion, similar to the policy in the case of *Joyce* v. *Kennard* (1), and, as was there said, not an ordinary marine policy. If, however, the policy is not to be treated as a policy "on goods," but as a contract of indemnity against a certain kind of liability up to a certain limited amount, it is very difficult to apply the suing and labouring clause to such a contract. That clause applies when there is a suing or labouring for the safeguard and recovery of "the said goods"; that is to say, the goods insured. As I have said, this is not an insurance on goods. Again, the suing and labouring clause undoubtedly contemplates and implies that, whilst the underwriters are to bear their share of any suing and labouring expenses, they are to bear such share only in the proportion of the amount underwritten to the whole value of the property or interest insured. If the assured has insured himself or goods to the extent of one-half only of the value of his property or interest in the goods insured, he, in respect of each and every item of suing and labouring expense, recovers one-half and bears one-half himself. This is the perfectly well-established basis of every adjustment of suing and labouring expenses. But how can this be applied in the case of a contract of indemnity against liability to a limited amount such as is here sued upon? There might be liabilities covered by the present policy which did not depend upon the safety of the goods. But assuming that the liability can be measured by the value of the goods—that is to say, the mules, and depends upon their safety, how is the proportion of suing and labouring expenses to be borne by underwriters to be arrived at? In the one case, where all the mules are on board the ship and are all in equal danger of total loss, and an expense is incurred to avert such loss—as, for instance, by towing the ship when sinking and placing her in safety on the beach—there would be no difficulty. But, assuming again that the total value of the mules is 40,000*l.*, and the liability covered is up to 20,000*l.*, as in the present case, and expense is incurred in saving the mules by getting them ashore one by one, and mules to the value of 20,000*l.* are thus saved and the rest lost, how is the expense to be apportioned? In such a case it might very well be said that the whole expense was for the benefit of the assured, and not for the benefit of the underwriters at all. Intermediate cases would present even greater difficulties.

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(1) (1871) L. R. 7 Q. B. 78.

I fully recognise that a suing and labouring clause might be framed which would be appropriate to such an insurance as was effected in the present case. But, in my judgment, any attempt to apply to the insurance in question a clause which was framed and intended to apply to an insurance of a different kind would work injustice, unless, in order to make the clause applicable to the insurance in question, it was so modified as to make it in fact a different clause altogether. I think that the suing and labouring clause in this policy, like many other parts of the policy, is inapplicable to the insurance actually effected, and was no part of the contract. I may add that, if I thought the suing and labouring clause must be held to apply, I should regard this as a strong reason for treating the policy as an open policy for 20,000*l.* on goods, with the usual consequences.

Judgment for defendant.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendant: *Parker, Garrett, Holman & Howden.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1901
Nov. 22, 28.
July 10.

HERBERT *v.* McQUADE.

Revenue—Income Tax—Public Office or Employment of Profit—Incumbent of Benefice—Perquisites or Profits accruing by reason of Office—Grant by Affiliated Branch of Queen Victoria Clergy Sustentation Fund—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *s.* 146; 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. E.*

The appellant, a beneficed clergyman, received for several years an annual grant of money from a diocesan branch affiliated to the Queen Victoria Clergy Sustentation Fund, a body incorporated with the object of providing adequate remuneration for the beneficed clergy for the work done by them; the fund was not intended to be merely a clerical charity. The funds of the diocesan branch were administered by a council whose aim was to raise the incomes of all benefices under 200*l.* per annum in value to that amount. The council did not take into consideration the personal circumstances of the particular incumbent, but the onus rested upon the applicant of deciding whether his own circumstances justified him in applying for a grant. The incumbent of a benefice of less than 200*l.* a year was not necessarily entitled to a grant, but the giving, withholding, continuance, and discontinuance of grants out of the funds were matters wholly within the discretion of the council. Where a benefice fell vacant during the year for which the grant was made, the grant was divided between the outgoing and incoming incumbent in proportion to the length of time for which each had been incumbent:—

Held (reversing the decision of a Divisional Court), that the grants received by the incumbent from the diocesan branch were "perquisites or profits accruing by reason of his office" within the meaning of the first rule contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sched. E, and that he was therefore liable to pay income tax under Sched. E upon them.

APPEAL from the judgment of a Divisional Court (Kennedy and Phillimore JJ.) upon a case stated by Commissioners of Income Tax. (1)

1. At a meeting of Commissioners for the general purposes of the Income Tax Acts for the division of Norwich city, held at Norwich, the Rev. G. N. Herbert appealed against the assessments of 65*l.* made upon him, under Sched. E of the Income Tax Acts, for each of the two years ending April 5, 1900, and April 5, 1901, respectively.

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(1) [1901] 2 K. B. 761.

2. The appellant is vicar of the parish of St. John de Sepulchre, in the city of Norwich, and the assessments of 65*l.* made upon him are in respect of sums of that amount granted to him by the Queen Victoria Clergy Sustentation Fund (Norwich Diocese), hereinafter referred to as the Norwich Diocesan Branch.

3. The Queen Victoria Clergy Sustentation Fund was established and incorporated by charter in the year 1897, and is hereinafter referred to as the central fund. The Norwich Diocesan Branch is affiliated to the central fund, but is controlled by the local diocesan council, which reserves to itself the entire control over the apportionment and distribution of grants, and the right to consider all the circumstances of the cases for which petitions are made.

Copies of the annual reports of the Norwich Diocesan Branch for the years 1897, 1898, 1899, and 1900, and of the charter and regulations, and the annual reports of the central fund for the years 1897, 1898, 1899, and 1900, are hereunto annexed and form part of this case. The statements and facts appearing in these documents are to be deemed to be applicable to this case, and the grants in question are made in the circumstances and subject to the conditions as therein set out.

[The charter of incorporation of the Queen Victoria Clergy Sustentation Fund declared the object and purposes of the corporation to be limited to the provinces of Canterbury and York, and to be (inter alia) as follows: "(1.) To impress upon all members of the Church of England the clearly defined Christian duty of contributing towards the support of the clergy. (2.) To supplement and extend the diocesan organisations for the support of the clergy, to elicit contributions for this purpose from the richer to the poorer dioceses, and generally to promote the further sustentation of the clergy. (3.) In particular, but not by way of restriction—

"(*a*) To promote the establishment and maintenance in every diocese of a diocesan organisation for the sustentation of its clergy;

"(*b*) To establish and maintain a central fund for the sustentation of the clergy;

"(*c*) To encourage diocesan organisations to affiliate themselves to the corporation on condition of paying contributions to the funds of the corporation."

For the purposes of the charter the corporation were empowered (inter alia) to acquire and hold real and personal property; to receive and administer the contributions from the affiliated diocesan organisations, and all general and special contributions, subscriptions, and bequests towards the funds of the corporation and the objects of the charter, and to make and apportion grants from the funds so held, administered, collected, or received, either directly, or by delegating such powers to any diocesan or other organisation.

The 18th of the regulations made under the charter provides that the council shall, out of their annual income, "make annual grants to such of the affiliated diocesan organisations as may appear to them in their discretion to require help; but upon the terms nevertheless that the sums granted shall not be capitalised as a provision for permanent endowment, but shall be applied in augmentation of the income of benefices where required, in such manner as the diocesan organisations shall from time to time in their discretion think fit."]

4. The primary object of the central fund is to obtain from Church people the necessary funds for providing adequate remuneration for the beneficed clergy.

The fund is intended to aid—

(1.) In raising those incomes of benefices which are normally very small;

(2.) In making up those incomes of benefices which have suffered reduction owing to agricultural depression or other causes;

(3.) In raising those incomes of benefices which are nominally of substantial value, but which, owing to the large population and consequent claims on the incumbents, are insufficient.

The fund receives contributions for—

(1.) The general fund (for annual grants to benefices);

(2.) For the permanent endowment or increase of endowments of benefices;

(3.) For special specified objects.

The aim of the Norwich Diocesan Branch is to raise the incomes of all benefices under 200*l.* a year (net) up to that amount, and grants are made upon applications received from incumbents, and in apportioning such grants to benefices the council take into consideration the population, duties, work, and all the claims upon the incumbent of the parish. A local contribution is required from assisted parishes. Grants are not necessarily made in respect of all benefices not exceeding 200*l.* per annum; nor does the receipt of a grant guarantee its continuance beyond the year for which it is made. An incumbent receiving a grant is only entitled to it for such portion of the year as he shall fill the office of the benefice; and when a benefice falls vacant in the course of a year for which a grant is made, it is divided between the outgoing and incoming incumbent in proper proportion to the length of time during the year for which each has been incumbent.

[The report (1897) of the executive committee of the Queen Victoria Clergy Sustentation Fund stated: "The fund is not intended to be an additional clerical charity, but aims at providing a fair remuneration for work done."

The report (1900) of the council of the Norwich Diocesan Branch stated: "The aim of the diocesan council is to raise the incomes of all benefices under 200*l.* a year (net) up to that amount. . . .

"The diocesan council reserves to itself the entire control over the apportionment and distribution of grants, and the right to consider all the circumstances of the cases for which petitions are made. They are given to benefices with net incomes of 200*l.* a year and under, and in apportioning them the population, duties, work, and all the claims upon the incumbent of the parish are considered. The receipt of a grant will furnish no guarantee of its continuance beyond the year for which it is made; nor will the declining of a grant by any incumbent preclude him from applying for assistance in any future year. The onus rests on each incumbent to decide whether his own circumstances really justify him in applying for the benefit of this fund. The diocesan council have decided that grants to benefices should run with the civil year in which they are made, i.e., from January 1st to December 31st, and that when a benefice falls vacant in the course of the year for which it is made, the grant be divided between the outgoing and incoming incumbent in proper proportion to the length of time during the year for which each has been incumbent."]

5. The funds of the Norwich Diocesan Branch are obtained from subscriptions, donations, collections, church offertories, and grants from the central fund. In order to obtain a grant from the central fund, one-fifth of the amount raised annually in the diocese is paid as an affiliation fee to the central fund.

6. The parish of St. John de Sepulchre, in the city of Norwich, of which the appellant is the incumbent, is a large populous parish with a poor population, and the work entailed in fulfilling the duties of the office of incumbent is arduous. The net income of the benefice is less than 200*l.* per annum.

7. The appellant as the incumbent of the benefice of St. John de Sepulchre has applied for and received a grant from the fund each year since its institution in 1897, namely, 1897, 1898, 1899, and 1900.

The Commissioners having heard and considered the appeal, and the contentions on behalf of the appellant and the surveyor, were of opinion that the sums comprised in the assessments were chargeable under s. 2 of 16 & 17 Vict. c. 34, or under the first or fourth rules of s. 146, Sched. E, of 5 & 6 Vict. c. 35, or otherwise, as accruing by reason of the office of the appellant (1), and they confirmed the assessments.

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(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146: "The duties hereby granted, contained in the schedule marked E, shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment.

"SCHEDULE E.

"*Rules for charging the said Duties.*

"1st. The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Sched. E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions. . . .

"4th. The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by

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The Divisional Court held that the sums received by the incumbent were not "perquisites or profits accruing by reason of his office" within the meaning of the first rule of s. 146, Sched. E, of the Income Tax Act, 1842, and accordingly reversed the decision of the Commissioners. The surveyor appealed. The appeal was heard on November 22 and 28, 1901, but was ultimately adjourned for the production of further evidence as to the machinery by which grants were applied for and allotted, which was produced at the adjourned hearing on July 10, 1902.

From an agreed statement of further facts and the other documents produced, it appeared that in February of each year the honorary secretary of the diocesan council, without regard to whether the incumbent had private means or not, forwarded a circular on his own initiative to every incumbent in the diocese the income of whose benefice was under 200*l*. The circular for 1899 was headed "Queen Victoria Clergy Sustentation Fund—Norwich Diocese," and proceeded: "Dear Sir,—To help the council of the above fund in making grants, so far as their means allow, to benefices in the diocese of which the net value is under 200*l*. per annum, I am requested by the diocesan council to ask you kindly to fill in the particulars mentioned overleaf, and sign the declaration, and to return this paper to me at your earliest convenience, on or before February 28th, 1899. . . . If the net value of your living for 1898 was under 200*l*., please fill in very accurately the following forms, and sign the declaration. Parish or parishes ———. Total population ———. Archdeaconry ———. Deanery ———." Then

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the Crown or the subject, in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year, or of the fair and just average of one year of the amount of the profits thereof in the three years preceding. . . ."

The schedule of charge now in force is contained in the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2.

"SCHEDULE E.

"For and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend payable by Her Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under the said Sched. C, and to be charged for every twenty shillings of the annual amount thereof."

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came a table of receipts under the following heads: "Tithe Rent Charge for 1898," "Glebe," "Fees," "Pew Rents," "Grant from Queen Anne's Bounty," "Grants from Ecclesiastical Commissioners," "Particulars of any other Ecclesiastical Income," "Total Gross Value for 1898"; following this came a table of deductions: "Poor Rate," "Highway Rate," "Land Tax," "Procurations," "Tenths," "Insurance on Chancel, Glebe House, and Buildings," "Other payments to Queen Anne's Bounty," "Repairs of Chancel," "Curates' Salaries paid by yourself. State why curate is required." After a statement of the net value, arrived at by subtracting the deductions from the receipts, came the following form of declaration: "I hereby declare that the net value of the living of ——— with ——— for the year 1898 amounted to £——— Do you wish to receive a grant from the Diocesan Clergy Sustentation Fund? Please answer Yes or No. Signed ———, Incumbent of the above benefice."

In the allotment of grants by the diocesan branch the private means of an incumbent were not taken into consideration. The test of qualification for a grant was the income of the benefice alone, whatever the private means of the incumbent might be, and no inquiry was ever made by the council as to the private means of an incumbent applying for a grant. The grant, when sent, was accompanied by a letter from the bishop in the following form: "Dear Sir,—I am glad to be able to forward you the enclosed cheque for £——— for the augmentation of your benefice. It is hoped that a grant may be given in future years, but it must be clearly understood that the reception of this grant establishes no claim to its renewal hereafter. If any clergy, feeling that they have no need of the grant, think proper to return the cheque, the money so returned will be given to the incumbent of some other poor benefice. I would also point out that, though it is not possible to insist upon it in all cases, it is a rule, which it is earnestly hoped you will endeavour to observe, that 'a local contribution to the fund will be expected from assisted parishes.' P.S. Carefully note—when a benefice falls vacant in the course of the year for which the grant is made (viz., from

January 1st to December 31st), the grant is to be divided between the outgoing and incoming incumbent, in proper proportion to the length of time during the year for which each has been incumbent." Then followed a receipt to be signed by the incumbent and returned to the honorary secretary.

Sir R. B. Finlay, A.-G., and *Sir E. H. Carson, S.-G.* (*Rowlatt* with them), for the Crown. The incumbent is liable to pay income tax upon this grant, which falls under s. 146, Sched. E, of 5 & 6 Vict. c. 35, for it is a profit accruing by reason of his office. A consideration of the constitution of the society shews clearly that the grant was made in augmentation of the value of the benefice as part of a scheme for raising the value of every benefice to 200*l.*, so as to ensure a reasonably adequate return for services rendered, and that it was not a mere personal or eleemosynary gift to the clergyman himself: in which latter case it would not be liable to taxation under Sched. E. The circular was sent yearly to every incumbent the value of whose benefice did not exceed 200*l.*, quite irrespective of the question whether he was possessed of adequate private means, and it was for him to decide whether his private means ought to prevent him from applying for a grant. The provision that if the benefice falls vacant during the year the grant is to be divided between the outgoing and incoming incumbent makes it clear that the latter, at any rate, becomes entitled to his share by virtue of his becoming incumbent of the particular benefice, and that it is not a personal gift to himself. The fact that the grant is a voluntary payment is immaterial; it is not the less a profit "accruing" by reason of the office because it is derived from a voluntary source; it need not be "payable" in the sense attributed to that word by Phillimore J. in the Divisional Court, i.e., that it is "legally" to be paid either by the Crown or by the subject. A barrister must pay income tax on his fees, though their payment is not legally enforceable, and a bookmaker is liable to pay income tax in respect of the profits of his business: *Partridge* v. *Mallandaine*. (1) In the case of *Inland Revenue* v. *Strang* (2)

(1) (1886) 18 Q. B. D. 276.

(2) (1878) 15 Sc. L. R. 704; 1 T. C. 207, reported sub nom. *In re Rev. George Walter Strong.*

a gift of money three years in succession to a minister of the Established Church of Scotland by his congregation was held to be a profit in respect of his office, and therefore liable to payment of income tax; that judgment was correct so far as it proceeded upon Sched. E, and is conclusive of the present case. The case of *Turner* v. *Cuxon* (1), upon which the present respondent relied in the Court below, is wholly different from the present case; there the payment was made to a curate as a reward for good work done by him for fifteen years: it was a payment purely personal to him for his work in the past, and had no relation to what he was then doing as curate. Supposing there were a case in which no income attached to the living beyond that derivable from this fund, it could not be argued that the grant would be a mere personal gift; it would clearly be given to the incumbent in relation to his office and to the services performed by him in that office; it makes no difference that there is income attached to the living besides that derived from a grant from this fund.

Danckwerts, K.C., and *F. Low, K.C.*, for the respondent. The decision of the Divisional Court was right. The case does not fall under the first rule for charging duties under Sched. E, for these grants are neither "perquisites" nor "profits" within the meaning of that rule; they do not "accrue" to the incumbent "by reason of his office." Nor does the fourth rule apply, for the "perquisites" there dealt with must be profits of the office.

[COLLINS M.R. The word "perquisites" in the fourth rule only deals with a certain class of "profits"; these grants may nevertheless come under the word "profits" in the first rule.]

No; for the first rule only applies to profits accruing by reason of the office. These payments do not "accrue" to the incumbent at all, for "accruing" means that they necessarily come to him by reason of his office; in other words, that they are "payable" to him by reason merely of his being incumbent. The evidence as to the constitution of this society

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(1) (1888) 22 Q. B. D. 150.

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clearly shews that the grant was not in the nature of an augmentation, permanent or otherwise, of the value of the benefice. The incumbent must disclose circumstances to justify the allotment to him of a grant, and the claims of other incumbents have to be considered by the council; the mere fact that the value of the living is under 200*l*. does not entitle an applicant to a grant, the allotment of which is a purely voluntary matter under the control of the council. The fact of the grant being voluntary negatives the idea of its "accruing" to, or being payable to, the incumbent by reason of his office; on the other hand, what is received from an endowment is received because the incumbent is entitled to it, and therefore he gets it by virtue of his office.

[COLLINS M.R. Assuming the case of a parish with no endowments, where voluntary subscriptions to the amount of 300*l*. a year were paid to the incumbent—would that not be taxable income?]

Not under Sched. E, for it would not be profits accruing by reason of the office; it might, however, be taxable as "gains" under Sched. D. This society is in effect a corporation for charitable purposes only, and if its surplus funds were invested the income in the hands of the corporation would be exempted from assessment under Scheds. A, C, and D (Income Tax Act, 1842, s. 61, Sched. A, No. 6; s. 88, Sched. C, 3rd exemption; s. 105, Sched. D), and there can be no reason why such income should be taxable under Sched. E; for it was not the intention of the Income Tax Acts that incomes received to be applied for charitable purposes should be the subject of taxation. The word "profits" is used in the Income Tax Acts in its natural sense in which it would be understood by an ordinary business man: *Tennant* v. *Smith* (1); *Gresham Life Assurance Society* v. *Styles*. (2) The case of *Inland Revenue* v. *Strang* (3) was argued only on the side of the Crown, and should not be followed; it was disapproved by Lord Coleridge C.J. in *Turner* v. *Cuxon* (4), which decision is entirely in point, the only difference being that in that case the person affected was a curate and in the present case a beneficed clergyman.

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(1) [1892] A. C. 150.

(2) [1892] A. C. 309.

(3) 15 Sc. L. R. 704; 1 T. C. 207, reported sub nom. *In re Rev. George Walter Strong*.

(4) 22 Q. B. D. 150.

Sir E. H. Carson, S.-G., in reply. The grant was a profit accruing by reason of the incumbent's office; a profit "accruing" under the first rule is wholly distinct from a profit "payable" under the fourth. It is immaterial that the original source of the grant was in the voluntary subscriptions made to this fund; it is impossible to draw any other inference than that the scheme of the fund was to raise the values of all benefices to 200*l.*; it is quite different from a payment made to a curate personally for meritorious services in the past. It is immaterial that the income of an invested surplus would not be taxable as long as it remained in the hands of the trustees; as soon as it is paid away it becomes taxable income in the hands of the recipients.

COLLINS M.R. This is an appeal by the Commissioners against the decision of a Divisional Court holding that a clergyman, who had been assessed to the income tax under Sched. E, under circumstances with which I will deal presently, was not liable to assessment. The question arises in this way. The respondent is the incumbent of a benefice under 200*l.* a year in value, and there is a society called the Queen Victoria Clergy Sustentation Fund, which has for its object the augmentation of benefices below a certain value (200*l.* in this case); the respondent received, in more than one year, from the society a sum which augmented the income of his benefice; and the question is whether he is liable to pay income tax under Sched. E upon the amount of that augmentation or not.

Undoubtedly these facts give rise to very nice considerations; and the question is on which side of the line this particular augmentation falls. If, as the respondent contended, it was in fact a gift personal to himself, I do not think that it would fall within Sched. E; if, on the other hand, it accrued to him by virtue of his office of incumbent, the respondent himself could hardly dispute his liability. That liability depends upon the language of the Income Tax Acts, the material parts of which are conveniently set out in a note to the report of the case in the Divisional Court. (1) The enacting section is s. 146 of the Income Tax Act, 1842, which provides that "The duties hereby granted, contained in the schedule marked E, shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act." Then comes Sched. E, r. 1, which says: "The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Sched. E" (one of which certainly embraces that of an incumbent), "or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions." Then there is rule 4, which gives the definition of the word "perquisites" as used in rule 1; but it does not seem to me that that definition in any way qualifies or controls the meaning of the words other than "perquisites" used in rule 1, and inasmuch as rule 1 also contains the word "profits," which the Solicitor-General contends is sufficient to cover the case for the Crown, I do not think that we need follow the argument on this point on behalf of the incumbent, the result of which, if the argument is a sound one, would be to exclude perquisites as a category under which this case would fall.

But that leaves untouched the respondent's main contention, because we have to consider, not "profits" merely, but "profits whatsoever accruing by reason of such offices." It was forcibly contended for the respondent that under the circumstances of this case the augmentation which came to him in consequence of the bounty of benevolent persons, he being in fact at the time the incumbent of a benefice, could not be said to be "profits accruing by reason of such office"; we are, therefore, brought to the narrow dividing line which I have already indicated, and we must see on which side of it this particular case falls. We can only determine that by studying the constitution of the society and the principles which it has laid down for its guidance in making these grants or augmentations.

(1) [1901] 2 K. B. 761.

Broadly, are they designed to be gifts to persons who happen to be poor whilst they are in occupation of benefices which are also poor, or are they primarily intended to augment the allotted stipends attached to particular benefices without special personal reference to the incumbent for the time being? Looking at the evidence, I think it is clear (and I can imagine good reasons which would induce the council to take that line) that they had determined not to inquire into the income of the particular holder of a benefice, but to take the income of the benefice itself as the standard for their guidance. In the statement of the principles upon which the fund is administered there is a distinct assertion that the enhancing of the receipts of the benefices is in no sense eleemosynary, but that it is made in recognition of the fact that the income attached to a particular benefice is inadequate as a return for the duties which have to be undertaken by the incumbent.

The annual reports of the society are made part of the case, and on page 2 of the report of the Norwich diocese for 1900 I find the following statement: "The fund has been established—(1.) With the primary object of obtaining from Church people the necessary funds for providing adequate remuneration for the beneficed clergy. (2.) To impress upon all members of the Church of England the clearly defined Christian duty of contributing towards the support of the clergy. The fund is intended to aid—(1.) In raising those incomes of benefices which are normally very small. (2.) In making up those incomes of benefices which have suffered reduction owing to agricultural depression or other causes. (3.) In raising those incomes of benefices which are nominally of substantial value, but which owing to the large population and consequent claims on the incumbents are insufficient." In that passage the council reiterate that the object of the fund is to deal with benefices, not with the persons who occupy the benefices, the standard being whether the income of the benefice is small, whether it has suffered reduction, or whether it looks larger than it in fact is. There is appended to the report an extract from a letter from the bishop of the diocese in 1897 which says: "The aim of the Clergy Sustentation Fund, the principle of which is not charity but justice, is to attach a sufficient maintenance to every cure of souls; or, in other words, to provide a living wage for every minister of God's word, that he and his family may be honourably maintained, and thus he may be able to discharge the duties of his sacred office without the harassing fear of not being able to pay his way." On the next page appears the following: "In regard to grants:—The diocesan council reserves to itself the entire control over the apportionment and distribution of grants, and the right to consider all the circumstances of the cases for which petitions are made. They are given to benefices with net incomes of 200*l*. a year and under, and in apportioning them the population, duties, work, and all the claims upon the incumbent of the parish are considered. The receipt of a grant will furnish no guarantee of its continuance beyond the year for which it is made; nor will the declining of a grant by any incumbent preclude him from applying for assistance in any future year. The onus rests on each incumbent to decide whether his own circumstances really justify him in applying for the benefit of this fund. The diocesan council have decided that grants to benefices should run with the civil year in which they are made, i.e., from January 1st to December 31st, and that when a benefice falls vacant in the course of the year for which it is made, the grant be divided between the outgoing and incoming incumbent in proper proportion to the length of time during the year for which each has been incumbent." It will be seen from these extracts that the society itself abstains altogether from inquiry into the personal circumstances of the incumbent for the time being. It emphasises the fact that it is dealing with a recognised state of things which in itself involves an injustice: that persons are put into onerous charge of parishes whose circumstances have to be inquired into and form a cardinal element in dealing with the case—parishes where the duties, by reason of the population, situation, and other circumstances, are largely out of proportion to the income of the benefice. That is what they are dealing with, and they are dealing with it irrespective of the personal circumstances of the incumbent in charge of the benefice, though of course as to that person himself, when he is making up his mind as to whether he shall apply for the grant or not, no doubt the facts of his personal income would necessarily and naturally be present to his mind; as between himself and the society, however, that is left by them to the incumbent. What the council deal with is the benefice, the emoluments attached to it, and the work imposed upon the incumbent.

I need not refer further to these reports, which all reiterate the cardinal principle of the scheme; but upon the last argument we were anxious at this point of the discussion to see what was the precise machinery which in the particular instance brought about the particular augmentation; that information we now have before us, and it throws considerable light upon the mode in which the scheme is carried out. It seems that in the first instance where a person is appointed to an incumbency of under 200*l.* a year he receives a circular from the fund, and he then makes up his mind—it is entirely a matter for himself—whether he will apply for an augmentation or not. The form which he receives is headed "Queen Victoria Clergy Sustentation Fund," and is as follows: [The learned judge read the circular set out ante, pp. 636, 637.] It is obvious from this form that the question of personal income is left entirely to the incumbent himself; the society does not deal with it, but it does deal (and the object of the scheme is to deal) with the emolument attached to the benefice. Next comes a letter, which makes this scheme still clearer, coming from the bishop to the incumbent. [The learned judge read the letter set out ante, p. 637.]

There are two remarks to be made on that letter. In the first place, the postscript shews that where a grant has been made under the circumstances I have described (that is, after the receipt of the circular by the incumbent and the exercise by him of his own judgment as to whether he will apply or not), if during the year the benefice falls vacant and a successor comes in, the grant is divided between the incoming and outgoing incumbents. Under those circumstances it is difficult to contend that there is not in terms and in fact and in result a grant to the benefice and not to the person. The second incumbent comes in, and becomes entitled at once to the unpaid residue of the income which accrues from this augmentation during this period—that is to say, during the period of his retention of the office. It must be admitted that the second incumbent takes the grant as an augmentation of the benefice; and what distinction can be drawn between his case and that of the first incumbent, who after receipt of the circular exercises his option in favour of applying for a grant? By his application he has merely put into operation the machinery whereby on application, if the funds admit of it, the augmentation becomes attached to the benefice of which he is incumbent; if therefore the successor takes it as part and parcel of the benefice, it seems to be equally part and parcel of the emolument attaching to the benefice simply, and none the less because the occupant of the benefice has put the machinery in motion: in either case it equally attaches to the benefice and not to the individual. That view is fortified by the passage in the letter which deals with the case of clergy who feeling that they have no need of the grant think proper to return the cheque; in that case "the money so returned will be given to the incumbent of some other poor benefice"—that is to say, it passes from one benefice to another, and is not a gift to the persons who occupy, or are incumbents of, the benefice at all. I need not refer to other letters which merely emphasise the same view.

We are now in possession of the facts relating to the origin of the society, the principle which it has laid down for its own guidance, and the actual course of practice which governs its proceedings. Do not these facts taken together point to this, that this is an organised attempt by benevolent persons—that is to say, persons who are of opinion that the labourer is worthy of his hire, and that the Church as a body ought to give an equivalent for the services that it receives—to bring up the emolument to the level of the duties, and that the system upon which they proceed to do that is to look to the duties incident to the incumbency of the particular benefice, to look to the emoluments and outgoings of that benefice, and to adjust their augmentation accordingly, entirely irrespective of the person holding the benefice? They must of course put the machinery in action, but they have very properly thought it right to leave the real initiative in the matter to the incumbent, and to leave it to him to determine as a matter between himself and his conscience whether he thinks it right that he should have the benefit of this possible augmentation—an augmentation, not to himself, but to the benefice of which he happens to be incumbent. What are the incumbent's rights? Surely his rights, if he has any, accrue entirely outside his own personal circumstances; they accrue to him by reason of his being the incumbent of the benefice. That is the only ground on which his rights can be based, and that being so (and that it is so appears to be clear almost to demonstration when one studies the scheme in its operation), what is the answer to the demand of the Crown? The incumbent's counsel lay stress on the word "accrue," and say that, when that word is considered in its technical sense, payment of this kind, made under an organised scheme for improving the emoluments of certain benefices, cannot be said to accrue to the incumbent by virtue of his office. For what other reason or in what other respect does it come to him? It comes to him only because he is the incumbent for the time being of a parish that is inadequately provided for, and it seems to me that such a payment falls directly within the words "accruing by reason of such office."

We have been referred to one or two cases that have been decided in reference to parallel cases, and that of *Turner* v. *Cuxon* (1) certainly requires to be dealt with by us, because the learned judges in the Court below, and more particularly Phillimore J., relied strongly upon it and regarded it as binding upon them. The head-note says: "The council of the Curates' Augmentation Fund made a grant of 50*l*. to a curate in recognition of faithful service for more than fifteen years. The grant was renewable at the discretion of the council, and such renewal was upon the condition that the curate obtained donations to the fund to half the amount of the grant: *Held*, that the curate was not assessable to the income tax in respect

(1) 22 Q. B. D. 150.

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of the sum granted, either under the Income Tax Act, 1842, Sched. E, or the Income Tax Act, 1853, Sched. D." Lord Coleridge C.J., in giving the judgment of the Court, said: "The sum of 50*l.* a year has been granted by the Curates' Augmentation Fund to a deserving curate, who for fifteen years or more has exercised his vocation without offence and without scandal. This sum is given partly also in return for efforts made by the curate himself to obtain subscribers to the society to the amount of one-half of that grant, and upon condition that he does obtain subscribers to that amount; it is not given to him as being curate of this parish, but as a donation, honoris causâ, for having worked hard during fifteen years without reproach. These are the conditions upon which the gift is made." If there ever could be instanced a gift that was personal to the receiver, it seems to me that it was this gift. It was given to this gentleman, who had been curate no doubt, but who had by his personal qualities and the length of time during which he had exhibited them established a claim upon the bounty of individuals, who gave him a present at the end of fifteen years' service. That appears to me to be a very long way separated from the cases under this Act. If I am right in my view of the system under which this augmentation of benefices is carried out and the practice that regulates it, it seems to me to be clearly distinguishable in fact from *Turner* v. *Cuxon* (1); the one case is well on one side of the line; the other is equally well on the other side. In the one case there is a gift, not in the sense of an eleemosynary donation at all, but an augmentation of a benefice made under an organised system for augmenting benefices irrespective of persons; in the other case a personal eleemosynary gift to a meritorious curate, which was none the less a personal gift because he happened to be the curate of the parish. That seems to me sufficient to distinguish that case and to destroy its authority as supporting the judgment of the Divisional Court.

There is also the case of *Inland Revenue* v. *Strang* (2), which, so far as it is an authority, bears the other way. It was dismissed by the Divisional Court on the ground that it seems to have been heard ex parte only; but nevertheless the learned judge who delivered the judgment seems to have carefully weighed it himself, and though it may be that upon the particular facts of the case the decision might be open to discussion (I give no opinion on that point), the question is whether the principles laid down in the judgment are sound, and those I do not understand to have been impugned in the Divisional Court. This is what Lord Curriehill says: "Although this case has been heard ex parte, the appellant not having appeared, I have not disposed of it as in absence, but only after carefully considering the argument for the appellant stated in the case. It is with some reluctance that I have formed the opinion that the Commissioners are wrong, and that the appellant is liable for income tax on the 100*l.* mentioned in the case. It is true that it is a voluntary contribution by the parishioners, one which they are under no obligation to make and which they may withdraw at any time, but still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes." Now that judgment, whether or not the particular facts justified it, is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it.

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(1) 22 Q. B. D. 150.

(2) 15 Sc. L. R. 704; 1 T. C. 207, reported sub nom. *In re Rev. George Walter Strong.*

That deals with the argument addressed to us on the meaning of the word "accruing," and I need not deal at length

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with the argument, which occupies a considerable part of Phillimore J.'s judgment, upon the definition of the word "perquisites." It is emphasised there that "perquisites," or those things which are described as "perquisites," are to be "payable either by the Crown or by the subject," upon which words Phillimore J. bases the contention that nothing which is not payable—that is to say, which is not exigible by law, or at all events does not constitute something that is legally to be paid (for of course we cannot make anything exigible upon the Crown)—can be a perquisite. I need not deal with that point, which is concerned only with the word "perquisites," the Crown being content to rest their case entirely outside that word or what it is defined to mean. For the reasons I have given I do not agree with the decision of the Divisional Court, and I think that this appeal should be allowed.

STIRLING L.J. I am of the same opinion. The Crown contend that the sum in question is a profit accruing by reason of an office held by the clergyman, and the question is whether that contention is well founded or not. Now, it was remarked by Phillimore J. (and truly remarked) that the word "accruing" which occurs in the section is a word of very wide and general meaning; but the learned judge proceeded to put upon it a limited interpretation, which he derived from a subsequent clause of the same Act defining the meaning of the word "perquisites." The duty is chargeable, not only on profits accruing by reason of an office, but also on all perquisites, the exact words being "all perquisites or profits whatsoever accruing by reason of such office." Looking at the definition of "perquisites" in the fourth rule, we find that they are profits of the office of a particular kind, and in defining them the word "payable" is used; but the object of the Legislature seems to me to have been, not to limit the duty to perquisites, but to extend it to profits of all kinds accruing in any way whatsoever, and I can see no foundation for the limitation which the learned judge has discovered for the word "accruing." I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part; and what we have to determine is whether the sum in question does so come to the holder of this office.

I do not propose to go through the evidence, which has been dealt with at length by my Lord; I content myself with saying that it appears to me throughout the documents which have been brought before us that the grants made by this society are made to benefices and not to incumbents. The grants are throughout stated as being made to the benefices; they constitute temporary additions to the income of the benefice, not to the income of any particular incumbent. That appears to me to be very clearly shewn by the statement which has already been read, on page 4 of the report for 1900, where it is said that, "When a benefice falls vacant in the course of the year for which it is made, the grant will be divided between the outgoing and incoming incumbent in proper proportion to the length of time during the year for which each has been incumbent"; and I may add that the form of receipt which is required to be given by each incumbent when he receives the grant is: "Received £—— as a grant from the above fund to be applied in augmentation of the income of the benefice of ——."

I may point out that, according to the evidence as it is now presented to us, though the grants are not made to incumbents, it appears to be necessary that an application for the grant should be made by an incumbent; but it is possible, not merely that that particular incumbent may not receive the whole of the grant which is made, but not even any part of it; for example, the rule states that grants are made to run with the civil year from January 1 to December 31; if a grant were made before January 1 on the application of the then incumbent, it is possible that he might die before the commencement of the year for which it was made: in which case I take it to be clear that he would not receive any portion of the grant, but that it would go to the succeeding incumbent. For these reasons I think that the appeal ought to be allowed, and I do not think it is necessary to discuss further the cases which have been cited.

MATHEW L.J. I am of the same opinion. The charter under which the fund was originally created clearly indicates that the object is the augmentation of the income of the benefice; and that this was the purpose appears with great clearness in the report for the year 1898. That contains the statement: "It may be desirable here to repeat that, in accordance with the original conception, the fund is intended to aid—(1.) in raising those incomes of benefices which are normally very small; (2.) in making up those incomes of benefices which have suffered reduction owing to agricultural depression or other causes; and (3.) in raising those incomes of benefices which are nominally of substantial value, but which, owing to the large population and consequent claims on the incumbents, are insufficient." In the same report also occurs this passage: "In connection with these grants, the council desire to emphasize the fact that, while they believe that the object they have in view of securing for the largest number possible of beneficed clergy an adequate increase of official income can best be attained by means of annual grants, yet they have no intention of discouraging gifts for endowments"—a very clear statement, in accordance with the charter, of the object of the creation of the fund. In the report for 1899 occurs this passage: "The council here wish to remind churchmen what are the fundamental principles of the fund, viz., first, to impress upon all the members of the Church of England the clearly defined Christian duty of contributing towards the support of the clergy; and, secondly, to supply, to some extent at least, the holders of ill-endowed benefices with an increase in their annual receipts, treated not as a matter of charity, but as a matter of justice." What, therefore, is the purpose for which the funds are applied in this way but to remunerate services which are considered to be inadequately provided for by the original stipend of the incumbent? That being the obvious purpose of the grant, I need not repeat what my Lord has referred to. The question has arisen whether income tax is payable, and when we look at the terms of the section and strike out the details which obscure its real meaning, we may put it shortly thus: First Rule, Sched. E: "The said duty shall be annually charged on clergymen for all profits whatsoever accruing by reason of their employment as clergymen." Can anybody doubt for a moment that the payment under these circumstances is a payment accruing by reason of the employment of this gentleman as a clergyman? I should have thought, had it not been for the ingenuity of the attempt of the respondent's counsel to rely upon the word "perquisites," that the question was unarguable. It is clear on referring to the section that these sums granted to incumbencies accrue to the incumbent by reason of his being incumbent. For these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Crowders, Vizard & Oldham, for Mills & Reeve, Norwich.*

W. J. B.

[IN THE COURT OF APPEAL.]

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RATCLIFF & DEALTRY *v.* MENDELSSOHN.

Stock Exchange—Default of Broker—Liquidation—Claim by Jobber—Right of Action against Broker—Contract carried out by Client of Broker—Claim by Jobber against Broker for Difference between Contract and "Hammer" Prices.

A member of the Stock Exchange who has become a defaulter may, notwithstanding that the liquidation is proceeding, be sued in respect of claims which are being dealt with in the liquidation.

A broker, who has become a defaulter on the Stock Exchange, can be sued for the difference between the contract and "hammer" prices in a transaction which has been carried out and settled by his client with the jobber through another broker, inasmuch as by the practice of the Stock Exchange the jobber has to pay to the official assignee the amount of that difference which he receives from the client.

Judgment of Mathew J., [1901] 2 K. B. 844, affirmed.

APPEAL from a judgment of Mathew J., reported [1901] 2 K. B. 844, at the trial of the action without a jury.

The plaintiffs were jobbers on the Stock Exchange. The defendant, who had been a broker on the Stock Exchange, was

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declared a defaulter on May 16, 1901. At the account on May 13 differences amounting to 986*l.* became due to the plaintiffs from the defendant in respect of certain shares. Certain other shares were carried over between the plaintiffs and the defendant to the next account, and the differences against the defendant between the contract price and the "hammer" price in respect of the shares amounted to 281*l.* Claims for these two sums were sent in by the plaintiffs to the official assignee. The official assignee collected assets of the defendant sufficient to pay a dividend of 2*s.* 6*d.* in the pound, and that dividend was paid to the plaintiffs. There were claims due to the defendant's estate which if collected would be sufficient to pay the claims against his estate in full, but the value of these assets was very doubtful. The transaction in respect of the shares which were carried over on May 13 was carried out and settled at the next account by the defendant's client through other brokers. According to the practice and course of business on the Stock Exchange, as proved at the trial by Dr. Richardson, the official assignee, the plaintiffs had to pay to him for the defendant's estate the sum of 281*l.* which they received from the client, being the difference between the contract price and the "hammer" price.

The plaintiffs brought this action, with the consent of the committee of the Stock Exchange, in order to obtain a judgment upon which proceedings in bankruptcy might be taken.

The defendant contended that he could not be sued until the liquidation was closed, and that, with respect to the claim for 281*l.*, there was no cause of action against him, because the transaction had been carried out and settled by his client.

The learned judge gave judgment for the plaintiffs. (1)

The defendant appealed.

Muir Mackenzie and *J. R. Atkin*, for the defendant. As to the 281*l.*, the rules of the Stock Exchange provide for the creation of an artificial fund and the distribution of the defaulter's estate: *Ex parte Grant, In re Plumbly*. (2) There can be no reason why the jobber should sue the defaulter in order to swell the artificial fund. He brings his action before he knows what he will get from the fund, and if he is right he might have his bargain completed—have the whole of the hammer price recouped, and yet recover from the defaulter. As to the larger sum, the official assignee is in the position of an assignee for the benefit of creditors. There has been a cessio bonorum, and so long as the distribution is in progress a creditor who takes the benefit of that cannot sue till the result is determined. *Ex parte Ward, In re Ward* (1), is distinguishable, for the decision turned upon the position after the closing of the liquidation, and the creditor was surety for the balance. In *Ex parte Ward, In re Ward* (2), the differences ascertained by the hammer price constituted a liquidated debt for which the creditor could prove in bankruptcy. It would be an anomaly that, though the debtor makes an assignment of all his property with certain priorities among the creditors, each of them should be entitled to sue for the whole of his debt.

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(1) [1901] 2 K. B. 844.

(2) (1880) 13 Ch. D. 667.

[They referred to *Whitmore* v. *Turquand* (3) and *Richardson* v. *Stormont, Todd & Co.* (4)]

Carrington (*Rufus Isaacs, K.C.*, with him), for the plaintiffs, contended that the case was concluded by the two decisions of *Ex parte Ward.* (5)

[They referred to *Tomkins* v. *Saffery.* (6)]

COLLINS M.R. This is an appeal from a decision of Mathew J., in which he held that an action was maintainable by dealers or jobbers against another member of the Stock Exchange for two separate sums: one the amount of differences ascertained in the ordinary way upon settling day, amounting to 986*l.*; the other for a sum of 281*l.*, which was the sum ascertained to be due from the defendant to the plaintiffs upon the hammer price, as it is called, namely, the price at the date when the defendant was declared a defaulter. The defendant was declared a defaulter in the interval between two Stock

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(1) (1882) 20 Ch. D. 356.
(2) (1882) 22 Ch. D. 132.
(3) (1861) 3 D. F. & J. 107.
(4) [1900] 1 Q. B. 701.
(5) 20 Ch. D. 356; 22 Ch. D. 132.
(6) (1877) 3 App. Cas. 213.

Exchange settlements, and the transactions, according to the rules of the Stock Exchange, were closed as between the members. Mathew J. has given judgment for the plaintiffs, who have sued for these two sums. Counsel for the defendant contests the learned judge's decision as to both of them, upon grounds which are to some extent different.

With regard to the larger sum, it was a common law debt due and recoverable on the date at which the amount was ascertained. Has anything happened to cut down that right? The only thing that has happened is that the broker has been declared a defaulter, and that this process of liquidation, if I might so call it, upon the Stock Exchange, according to its rules, has been carried on. Unless that operates as a release, it is no answer to the claim. The matter is concluded by the decision of *Ex parte Ward* (1), which was a decision on almost identically the same facts as in this case. The head-note, so far as it refers to this point, is this: "A creditor of a defaulter on the Stock Exchange who has taken the benefit of the private distribution of Stock Exchange assets, made by the official assignee of the Stock Exchange under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee." Right or wrong, that is a decision absolutely in point in this case. It is a decision of the Court of Appeal, and therefore it is binding upon us. As to that first sum of 986*l.*, therefore, I agree with Mathew J., both in his decision and in the grounds for it, that there is no defence to the action.

Then comes the smaller sum of 281*l.* As to that, a complication is introduced into the matter, and the question is whether it in any way alters the law as applied to the larger sum. The complication is this. As I have said, this particular difference is ascertained to be due upon the basis of what is called the hammer price, and that sum, so ascertained before the period for performance by the principal arrived, constituted, as the plaintiffs contend, a debt between the defaulting broker and the person with whom he had dealt. If it did so, the matter stands on exactly the same footing as the larger sum, because, being a debt when sued for, the debtor has to pay it unless he can set up some defence; and the only defence he can set up is one I will deal with in a moment. It is a defence based upon this private arrangement which has taken place on the Stock Exchange, and unless that amounts to a release he is in exactly the same position with regard to the second point with which I am dealing as he is with regard to the first. Is this hammer price, so ascertained, a debt? Here, again, we have clear authority upon the point in the second case of *Ex parte Ward*, reported in 22 Chancery Division at page 132. The head-note is this: "The amount of the differences due by a defaulter on the London Stock Exchange (as fixed by the official assignee of that body under its rules) to a Stock Exchange creditor, is a 'liquidated sum' within the meaning of s. 6 of the Bankruptcy Act, 1869, and will support a bankruptcy petition by the creditor against the defaulter." In the course of the argument in that case, the reason why it is a debt is explained. Counsel argued (1): "The original contract between the debtor and the petitioners still subsists"; and Sir George Jessel M.R. said: "How can there be two contracts?" And then in his judgment, on the same page, he explains the matter further thus: "The purchaser in this case became a defaulter, and he must be treated like every other defaulter. It is really as if the rules of the Stock Exchange were imported into the contract. The provisions of the rule must be considered as inserted in the contract, and to that extent they alter the wording of the contract, so that we have the contract altered in this way—that the purchaser is to pay for the shares on the settling day, provided always, that if he becomes a defaulter before then, the amount due from him is to be ascertained in accordance with the rules of the Stock Exchange. If that is so, there appears to be no foundation for the argument that this rule is to be limited to ascertaining the amount to be claimed from the assignee of the Stock Exchange. The amount is ascertained for all Stock Exchange

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(1) 20 Ch. D. 356.

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(1) 22 Ch. D. 132, at p. 134.

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purposes, that is, for the purposes of the contract." So that the rule is introduced into the contract, and a sum is so ascertained which is due from the defaulting broker, and can be sued for by the jobber unless something has happened which amounts to a defence.

Now what is that something which is suggested as a defence? The fact that there is a fund being collected, and that the assets are being got in under the Stock Exchange arrangement is, on the authority of the first case I cited, not a release. But then, it is argued, there is another consideration which, rightly understood, does operate, if not as a release, at all events, in some way which is difficult to define in point of law, as a suspension of the right. The point is that when the settling day arrived the principal completed the contract with the jobber, who has handed over the difference to the official assignee. How does that alter the case? It is only done under a rule of the Stock Exchange to equalize the rights of all the members of the Stock Exchange who are interested, and any one coming in and claiming a dividend who gets also a special difference hands the sum over to the common fund. This is all that has happened in this case, and it has no relation to rights between the member and his creditor.

The two cases are governed by the same principle, and there is no answer to the plaintiffs' claim in either of them.

There was an interesting and ingenious argument raised for the defendant to which I must refer. An early authority, also in the Court of Appeal, namely, *Whitmore* v. *Turquand* (1), was cited, in which case it was inferred as a necessary inference from the facts that there had been a cessio bonorum, which, though there was no express release, was taken to operate as a release. We are not concerned to reconcile that decision with later ones, though I am not sure that it could not be reconciled. It is not necessary to go into that matter, because we have a series of express decisions on the point before us, and there can be no doubt that the transaction in this case resulting in a distribution of the assets under the rules of the

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(1) 3 D. F. & J. 107.

Stock Exchange did not amount to a release. The result is that this appeal must be dismissed.

STIRLING L.J. I am of the same opinion, and I entirely agree that the present case is governed by the two decisions of the Court of Appeal in the case of *Ex parte Ward*, reported in the 20th and 22nd volumes of the Chancery Division, which are both binding on us.

COZENS-HARDY L.J. I agree. I only desire to refer to one passage in Cotton L.J.'s judgment in the second case of *Ex parte Ward* (1) as confirming the view expressed by the Master of the Rolls. The Lord Justice said: "Rule 170," which corresponds with the present rule 177, "in the case of a defaulter really alters the original contract, and provides a new contract as between the defaulter and his creditor." If that be the true view, it seems to me impossible to draw any distinction between the smaller sum and the larger one that was due on the mid-May settlement. In each case there was a debt, an ascertained amount in respect of which the liability at law of the broker is not in any way affected by the rules of the Stock Exchange domestic forum. It is suggested that the effect of the rule and the result of the cessio bonorum were overlooked by the judges who decided these cases. When we examine the authorities that appears to be impossible. The effect of such a transaction with the Stock Exchange creditors was stated in forcible, and I would almost say in classical, language by James L.J. in the year 1876 in the case of *Ex parte Saffery* (2), and in his judgment the learned Lord Justice dealt with the question of a "cessio bonorum." That case went to the House of Lords in 1877 under the name of *Tomkins* v. *Saffery* (3), and the view taken by the Court of Appeal was upheld. It is impossible seriously to suggest that this important decision was not present to the minds of the learned judges who decided *Ex parte Grant* (4) and the two cases of *Ex parte Ward*. (5) The interesting argument that we have heard is not one to which we can accede, and the judgment appealed from must be supported.

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(1) 22 Ch. D. 132, at p. 135.

(2) (1876) 4 Ch. D. 555.

(3) 3 App. Cas. 213.

(4) 13 Ch. D. 667.

(5) 20 Ch. D. 356; 22 Ch. D. 132.

Appeal dismissed.

Solicitors for plaintiffs: *Michael Abrahams, Sons & Co.*
Solicitors for defendant: *Osborn & Osborn.*

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[IN THE COURT OF APPEAL.]

TOLHURST *v.* THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED.

THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED, AND THE IMPERIAL PORTLAND CEMENT COMPANY, LIMITED *v.* TOLHURST.

Contract—Assignability—Contract to supply Goods to Company—Liquidation of Company—Assignment of Contract—Rights of Contracting Company and of Assignee.

The owner of land contracted with a company to supply them for fifty years with at least 750 tons of chalk per week, and so much more as they might require for their manufacture of cement upon their land, the chalk to be delivered in convenient daily quantities as required by the company by written notice given on the preceding day. The company, which had a small capital and was doing a comparatively small business, went into voluntary liquidation and transferred all its business and property, and purported to assign this contract to a second company, which had an extensive business, carried on at various places, and a large capital:—

Held, that though the second company could not maintain an action on the contract in their own right as assignees of the company with whom the contract was made, the contract was a subsisting one between the original parties to it, and had not been put an end to by the liquidation of the original company or the assignment to the second company, or by both those facts taken together.

Judgment of Mathew J., [1901] 2 K. B. 811, reversed.

APPEALS from the judgment of Mathew J. in two actions tried together and reported [1901] 2 K. B. 811.

Tolhurst, the plaintiff in the first action, entered into a contract dated January 5, 1898, with the Imperial Portland Cement Company, Limited, hereinafter called the Imperial Company, in which it was recited that Tolhurst was the owner and occupier of chalk quarries in Northfleet, and that the company were the owners of a piece of land in Northfleet which they had recently purchased from Tolhurst. The first clause of the contract provided that the company would construct a tramway from the point up to which Tolhurst had already constructed a tramway to a convenient spot upon their land, in all respects proper for the working of traffic in the delivery of chalk as thereinafter mentioned, and would permit Tolhurst to use their tramway for the purpose of so delivering chalk, and would keep it in good workable repair so long as it should be required for those purposes. The second clause provided that "when the tramway to be constructed by the company as aforesaid shall be completed the said Alfred Tolhurst will, for a term of fifty years from December 25, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of the said Alfred Tolhurst, at least 750 tons per week and so much more (if any) as the company shall require for the whole of their manufacture of Portland cement upon their said land. And the said Alfred Tolhurst will provide all rolling stock and traction power and will deliver such chalk by conveying it in waggons . . . . over the tramways aforesaid to alongside the wash-mills or stores of the company or other convenient places to be provided by them as the company shall direct; but this agreement shall not preclude the said Alfred Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise." The third clause provided that "the chalk shall be delivered as aforesaid in such convenient daily quantities as the company shall by writing, delivered at the office for the time being of Tolhurst upon his said land before four o'clock of the preceding working day, have reasonably required." By clause 4 the price agreed was 1*s.* 3*d.* per ton, and payment was to be made monthly on the 10th of the month following delivery.

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In October, 1900, special resolutions were duly passed and confirmed that the Imperial Company should be wound up voluntarily. On November 30, 1900, all the land belonging to the Imperial Company was conveyed to the Associated Portland Cement Manufacturers (1900), Limited, hereinafter called the Associated Company, and all the goodwill and connection of the Imperial Company, and the sole use of their trade name, and the full benefit of all pending trade contracts in connection with the said business, including the contract with Tolhurst of January 5, 1898, were assigned to the Associated Company. The Associated Company had been incorporated in 1900, with a nominal capital of 5,000,000*l.*, for the purpose of purchasing and carrying on various cement manufacturing businesses. The Imperial Company was a company with a small capital which carried on business only at their works at Northfleet.

On December 12, 1900, notice was given to Tolhurst by letter from the Imperial Company that they were in liquidation, and that their land and business had been transferred to the Associated Company. Tolhurst thereupon wrote to the Associated Company offering to supply them with chalk at 2*s.* a ton, and it was arranged that he should supply chalk pending the decision of the Court as to whether he was bound to supply it at the price named in the original contract. The Associated Company took possession of the works and business of the Imperial Company, and Tolhurst supplied them with a large quantity of chalk. They claimed to be entitled to the benefit of the contract between Tolhurst and the Imperial Company, and to pay 1*s.* 3*d.* a ton for the chalk. Tolhurst denied their right to the benefit of that contract, and claimed 2*s.* a ton for the chalk, and the first action was brought by Tolhurst against the Associated Company to recover the price of the chalk sold and delivered by him to them, taking the price at 2*s.* a ton, and for a declaration that he was not under any obligation to supply chalk to that company.

The Associated Company and the Imperial Company brought a cross-action against Tolhurst claiming a declaration that the contract of January 5, 1898, was a valid and binding contract, and that the plaintiff companies, or one of them, were or was entitled to be supplied by the defendant with chalk on the terms of that contract and to have the contract performed by the defendant.

The learned judge decided in favour of Tolhurst in both actions. (1)

The Associated Company in the first case and the two companies in the second appealed.

July 23. *Foote, K.C.*, and *Younger, K.C.* (*Bremner* and *H. E. Wright* with them), for the appellant companies. The contract with the Imperial Company is assignable. No personal element of individual skill or competency comes in question: *British Waggon Co.* v. *Lea* (2); and the contract itself by the length of the term shews that it was contemplated that others than the actual contracting parties might at some future time be interested, even though no words of succession are used. Tolhurst was not entitled to treat the contract as rescinded, and it is clear that he did not so treat it. Rescission must be by both parties: *Morgan* v. *Bain*. (3) No additional burden is thrown upon Tolhurst which would entitle him to repudiate the contract. Neither liquidation nor bankruptcy by itself establishes rescission. It may be that Tolhurst on the liquidation of the Imperial Company might have been entitled to demand cash and may be now entitled to do so; but the liquidation would have no further effect. The contract is an asset of the Imperial Company with which the liquidator might deal as "a thing in action" under s. 95 of the Companies Act, 1862 (25 & 26 Vict. c. 89), and therefore the purchaser may, under s. 157, bring or defend an action relating to the contract in his own name. Further, s. 25 of the Judicature Act, 1873, is wide enough to cover the assignment of the benefit of a contract which has not been determined: *Torkington* v. *Magee* (4), where a contract was held to be assignable because it was one of which equity would enforce specific performance. It is not contended that there has been an acceptance of the Associated Company so as to release the Imperial Company. The real

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(1) [1901] 2 K. B. 811.

(2) (1880) 5 Q. B. D. 149.

(3) (1874) L. R. 10 C. P. 15.

(4) Ante, p. 427.

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effect of the assignment is to give Tolhurst an additional debtor, and even if the Associated Company cannot sue as assignees the contract is a subsisting one with the Imperial Company, and can be enforced by or in the name of that company. If necessary, the contract is divisible, and the liability to supply 750 tons a week would be assignable.

Pickford, K.C., and *George Wallace*, for Tolhurst. There is no authority, with the possible exception of *British Waggon Co.* v. *Lea* (1), for the position taken up by the Associated Company, that there is a contract between that company and Tolhurst. When the contract was made there was no intention, express or to be implied, on the part of Tolhurst to contract except with the Imperial Company, or to incur any liability to a company which was not even in existence at that time. The Imperial Company rendered themselves powerless to perform the contract, for as a company they had no assets, and Tolhurst was entitled to treat that which they did as a repudiation of the contract. If at the mere will of one of two contracting parties the contract is assignable, what is the meaning of the cases as to novation? It is not true to say that the assignment gives Tolhurst another debtor: it really purports to create another party to the contract. Where there is a beneficial contract to be performed in futuro, it cannot be assigned by one of the parties: such a proposition is without authority and is contrary to principle. The *British Waggon Co.* v. *Lea* (1) only decided that if work had been done for the defendant he must pay for it: there was no question of giving credit to a person to whom he had not agreed to give it. The present case is exactly that of the *Arkansas Smelting Co.* v. *Belden Co.* (2), for the Imperial Company has no substantial existence and cannot pay for chalk supplied to the Associated Company. It is a fallacy to say that Tolhurst is bound to supply chalk against cash payments. If the contract is assignable the right to credit continues, and Tolhurst cannot be bound to give credit to a person to whom he never intended to give it. The contract is not divisible as suggested, and the position taken up by the Associated Company is that they have been substituted

(1) 5 Q. B. D. 149.

(2) (1888) 127 U. S. 379.

for Tolhurst and may enforce their requirements, because all the obligations under the contract have been assigned to them. Neither s. 56 of the Bankruptcy Act, 1883, which gives power to the trustee to sell a bankrupt's property, nor the Companies Act, 1862, gives a right to assign anything not previously assignable: *Griffith* v. *Tower Publishing Co.* (1); and this applies also to s. 25, sub-s. 6, of the Judicature Act, 1873: *May* v. *Lane.* (2) It may be admitted that liquidation alone would not put an end to the contract; but when it is followed by an intimation that the company had parted with the contract and disposed of its business, there is ample evidence of repudiation: *Ex parte Stapleton.* (3)

[They cited also *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (4); *Robson* v. *Drummond* (5); *Wentworth* v. *Cock* (6); *Davies* v. *Davies* (7); *Grierson, Oldham & Co.* v. *Forbes, Maxwell & Co.* (8)]

Younger, K.C., in reply.

Cur. adv. vult.

Aug. 12. COLLINS M.R. read the following judgment:—The question raised in these appeals is whether a contract made between one Tolhurst and the Imperial Portland Cement Company, Limited, for the supply of chalk by Tolhurst to the company for their manufacture of Portland cement upon a certain piece of land can be enforced against Tolhurst, the company having assigned to another company called the Associated Portland Cement Manufacturers (1900), Limited, its property and undertaking, including the contract in question, without the consent of Tolhurst.

The Imperial Company went into liquidation immediately upon the assignment, and during the pendency of this litigation all its assets have been fully distributed, but it has been kept alive so far as to admit of actions being brought in its name to recover book debts. The deed of assignment also contains a covenant by the new company to indemnify the old against all claims and liabilities in respect of trade contracts, and we were told that this right to indemnity is its sole remaining asset. On December 12, 1900, the old company wrote to Tolhurst as follows: "Dear Sir,—I have been instructed to advise you that the sale of our business to the Associated Portland Cement Manufacturers (1900), Limited, was completed yesterday, to take effect as from the 30th ult. Yours faithfully, Imperial Portland Cement, Limited, in liquidation, Ernest W. Elliott for the liquidators." Tolhurst, on December 20, wrote to the secretary of the new company as follows: "Dear Sir,—I have received a communication from the Imperial Portland Cement Company, Limited, in liquidation, informing me that they had sold their business to the Associated Portland Cement Manufacturers (1900), Limited, and that such sale took effect as from the 30th ult.; but, as I have received no similar communication from your company as the purchasers, I should be glad to know whether we are to continue to supply these works with chalk, which I am quite willing to do at 2*s.* per ton delivered alongside your chalk store, your men tipping the trucks on their arrival so that the engine takes back empty trucks without being detained. Pending hearing from you, I will continue to supply what may be required at the above rate." Some further letters followed, in which both parties adhered to their original positions, and it was ultimately arranged that Tolhurst should continue to deliver chalk to the new company pending the decision of the Court as to whether he was bound to supply it at the price agreed in the contract with the old company. The material parts of that contract were as follows: After reciting that the company had recently bought a piece of land from him and that he was the owner of chalk quarries, and had constructed a tramway up to a point on land of the company, the latter undertook to connect with it and carry forward another tramway for the purpose of receiving and delivering chalk from Tolhurst's quarries at their works. By clause 2 it was provided as follows: "When the tramway to be constructed by the company as aforesaid shall be completed the said Alfred

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(1) [1897] 1 Ch. 21.
(2) (1894) 64 L. J. (Q.B.) 236.
(3) (1879) 10 Ch. D. 586.
(4) [1902] 1 Ch. 146.
(5) (1831) 2 B. & Ad. 303; 33 R. R. 569.
(6) (1839) 10 Ad. & E. 42; 50 R. R. 316.
(7) (1887) 36 Ch. D. 359.
(8) (1895) 22 R. 812.

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Tolhurst will for a term of fifty years to be computed from December 25, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of the said Alfred Tolhurst at least 750 tons per week, and so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land. And the said Alfred Tolhurst will provide all rolling stock and traction power, and will deliver such chalk by conveying it in waggons, such waggons to be side or end tip as required by the company over the tramways aforesaid, alongside the wash-mills or stores of the company or other convenient places to be provided by them as the company shall direct; but this agreement shall not preclude the said Alfred Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise." By clause 4 the price to be paid for the chalk is 1*s.* 3*d.* per ton, and the company are to pay in cash monthly on the 10th of the month following delivery, subject to neither party being prevented from delivering or taking by strikes, &c., as stated in clause 6, which further provides that if Tolhurst is so prevented from delivering, the company may obtain chalk elsewhere. It will thus be seen that the goods were deliverable on credit, and—beyond a minimum amount—to the extent of so much more as the company should require for the whole of their manufacture of Portland cement upon their land.

The litigation was initiated by Tolhurst suing the new company for the price of chalk delivered by him to them at 2*s.* a ton, and for a declaration that he was not bound to deliver at the contract rate as between him and the old company. The defendants relied upon the defence that they were entitled to the benefit of the contract to have the chalk delivered at 1*s.* 3*d.* a ton. The old company was not, in fact, a party to these proceedings, but I think that, having regard to the correspondence, no point can be made of this. A cross-action was then

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brought by the new company joining the old to establish that the contract was subsisting and binding upon Tolhurst, and to have it performed. Mathew J. has held that the contract cannot be enforced against Tolhurst.

It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor: see *Liversidge* v. *Broadbent* (1), and cases collected in the notes to *Lampleigh* v. *Brathwait*. (2) On the other hand, it is equally clear that the benefit of a contract can be assigned, and whereever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice. Whether the right so created involves privity between the debtor and the assignee is, I think, doubtful; and the rule of the common law that the action must be brought in the name of the assignor shews that it did not regard such a transaction as equivalent to a novatio. The right seems rather to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit of it to another person. The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit would seem in principle and in common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it, and I think the right of dropping the original contractee out of the discussion must be limited to those cases only in which the contract—that is, the benefit of all that remains to be done under it—has been assigned; and

(1) (1859) 4 H. & N. 603.

(2) 1 Sm. L. C. 10th ed. p. 136.

it is in this sense only, as it seems to me, that contracts can be said in strictness to be assignable. There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person. "You have a right," says Lord Denman C.J., in a passage cited by Gray J. in delivering the judgment of the Supreme Court of the United States in the case of *Arkansas Smelting Co.* v. *Belden Co.* (1), "to the benefit you contemplate from the character, credit, and substance of the party with whom you contract": *Humble* v. *Hunter*. (2) To suits on these contracts, therefore, the original contractee must be a party, whatever his rights as between him and his assignee. He cannot enforce the contract without shewing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot. He cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for—namely, work to be executed by the party himself. If, for instance, he had ordered a painting from some unknown artist of his own choice, he could not be compelled to accept instead of it the work of another artist, however eminent.

These considerations seem to me to establish beyond all question that the present case is not one where it would be possible to assert that on any rule of law or equity the new company could be deemed to be substituted into the place of the old one at the mere will of the assignor without the consent of Mr. Tolhurst. The latter may be wrong, but he is entitled, it seems to me, to have a choice in the matter of the person or company to whom he is asked to give credit, and he may prefer, and I think he is entitled to prefer, to deal with a particular company doing business in one place on a comparatively small scale, rather than with one which is about to embark upon a large combination of competing businesses requiring a very large capital and involving commensurate risks. No instance of such a contract being sued on in the name of the assignee has been adduced, and the judgment of the Supreme Court of the United States in the case cited is clear against it; while for the reasons I have above given it seems to me to fall outside that limited class of cases in which privity or quasi privity can be said to be established without novation.

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(1) 127 U. S. 379, 387.

(2) (1848) 12 Q. B. 310, at p. 317.

To support this ground of claim, counsel for the appellants relied upon s. 157 of the Companies Act, 1862, and s. 25 of the Judicature Act, 1873. But these sections must, I think, be read with some limitation. They have never been construed as rendering assignable contracts which were before incapable of assignment, such as those involving special personal qualifications on the part of the person claiming performance, and they do not override the common principles of law and equity so as to compel a man against his will to accept something essentially different from that which he stipulated for: see the judgment of the Court of King's Bench, delivered by Channell J. in *Torkington* v. *Magee*. (1) It would seem, then, that the appellants' case can be supported only, if at all, on the ground that the old company is a party to the proceedings, as it certainly is in the action brought by it.

The case, therefore, must be considered now solely on the footing that the second action is brought by the original contractees, the old company. In this view the assignment is only material as negativing capacity on the part of the plaintiffs to perform their obligations under the contract. The privity between them and Tolhurst still subsists notwithstanding the assignment, and they are entitled to insist on performance on his part unless he can shew a valid defence. Such a defence he might establish if he could shew that the plaintiffs had by their conduct repudiated the contract, and that he accepted such repudiation. Or he might shew that the plaintiffs had disabled themselves from performing their part of the contract, and therefore could not insist upon performance by him. Both these defences are in fact put forward by Tolhurst, and both are based on the circumstances of the voluntary liquidation and the assignment. It is necessary, therefore, to consider carefully what is the effect upon the contract of these two facts together or separately. Liquidation of itself clearly does not involve inability to carry out the contract, though it certainly may, coupled with other circumstances, such as those mentioned in *Ex parte Chalmers* (1) and *Morgan* v. *Bain* (2), ground an inference that the liquidating company has renounced the contract. Here there does not seem to me to be sufficient evidence to justify any such inference. At the time when these actions were brought and tried the company was in possession of assets undistributed amounting to a very large sum, and could in no sense be described as insolvent, even if insolvency without more could be treated as equivalent to a repudiation of the contract, as it clearly could not: see *Ex parte Chalmers.* (1) Insolvency alone could at most entitle the person called on to deliver to refuse to do so except on cash terms: see *Morgan* v. *Bain* (2) and *Ex parte Stapleton* (3); and no point could be made by the defendant here that cash was not offered, since by refusing to deliver at all on the ground that the contract was at an end he clearly absolved the plaintiffs from tendering cash, had such tender been a condition precedent to their right to demand delivery. But, as I have said, at the time of the trial there was no evidence of insolvency. It is true that since the trial and before the

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(1) Ante, p. 427.

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(1) (1873) L. R. 8 Ch. 289.
(2) L. R. 10 C. P. 15.
(3) 10 Ch. D. 586.

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hearing of the appeal the assets of the company have been completely distributed, and nothing is left to it but its name and its right to claim indemnity from the new company. But even if we could decide the case by reference to the facts as they exist now, insolvency, for the reason I have given, would not be an answer to the claim. How far, then, does the assignment alter the case? It is relied upon for two contentions: first, that coupled with insolvency it proves repudiation; secondly, that the obligations of the contract are such that they cannot be discharged by deputy, and that the company having assigned has disabled itself from performing them. But with reference to the first contention, it is clear from the terms of the assignment that there was no intention to renounce the contract, but that, on the contrary, it was part of the bargain that it should be kept in force, the assignees taking the benefit of it and indemnifying the assignors against the burden, while provision is made for the use of the old company's name. There is, therefore, nothing to ground an inference of repudiation, and the question must be determined by reference to the second point only. That depends on whether the two obligations resting on the old company were capable of performance by them according to the contract, notwithstanding the assignments. The two are—payment for the chalk, and requirement by them "for the whole of their manufacture of Portland cement upon their said land" as a condition of receiving the extra quantity. I think there is clearly no personal element in the payment of the price. It could make no difference to Tolhurst from what source it came; and the old company can, therefore, discharge this obligation by the hand of the new company. As to the other there is undoubtedly more difficulty. The measure of an original contractor's requirements may be very different in a given case from those of a substituted person. In such case clearly the original contractee could not insist on his contractor furnishing a supply equal to the requirements of the substitute, and could not prove that he required it himself. This part of the contract would be personal, and could only be fulfilled by the contractee himself. I confess that I have felt

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very considerable difficulty on this part of the case, for though the contract provides a minimum quantity I am by no means satisfied that it could be split up, as contended by the appellants, without the assent of the vendor so as to limit it to the minimum quantity only. The price may have been fixed by reference to the possible maximum as well as the minimum clause. I have come to the conclusion, however, though with some hesitation, that the provision as to requirement is not personal in its nature in this case so as to involve manufacture by the old company itself as the condition of requirement. It is a stipulation regulating the amount of supply only, and the limit is "so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land." The capacity of the land and the machinery thereon rather than anything personal to the company is here made the standard, and I think the vendor must be taken to have contemplated all such changes as the company might make according to law in increase or reduction of its capital and the possible expansion or contraction of its requirements above the minimum quantity. The minimum and the maximum quantities of chalk to be taken are thus regulated by limits quite outside anything personal or peculiar to the old company. The general rule, "Qui facit per alium facit per se," applies to contracts of this class unless there is something in the terms of the bargain or the nature of the obligation imposed to require personal performance. The case of *British Waggon Co.* v. *Lea* (1) is a clear authority both that liquidation coupled with assignment does not determine a contract, and that the assignors, a company who by their contract had undertaken to keep in repair waggons which they had let to the defendant, were not prevented from proving readiness and willingness to perform the contract on their part by the fact that they had assigned their business and all their repairing plant to another company. While, therefore, I have had grave misgivings whether the new state of facts brought about by the liquidation and the assignment, involving the practical extinction of the original company party to the contract, and the virtual substitution of another and a very different one, has not so radically altered the vendor's position that he ought to be held absolved from his bargain, I am unable on the whole to find a sound legal basis for his defence. There is certainly an apparent hardship, unless he accepts the new company instead of the old, that whereas before the assignment he had a solvent company to deal with against whom he had an effectual remedy if they refused to perform the contract, now, if the price of chalk were to fall below 1*s.* 3*d.*, and the new company no longer cared to take it at that price, his only remedy would be against a company wholly denuded of assets. But a vendor has no right to the continuous solvency of his purchaser, and cannot cease to deliver as long as he is paid, although he knows that if the purchaser should decline to take any more in a falling market he would be without remedy. It is further very undesirable that, except so far as we are constrained by law to do so, we should put any barrier in the way of traders disposing freely of the goodwill of their businesses, which generally consist largely of trade contracts.

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(1) 5 Q. B. D. 149.

I have attempted to consider the question of the change of position brought about by the consignment on purely legal principles; but it seems to me on the facts, so far as we know them from the correspondence, that these considerations had really nothing to do with Mr. Tolhurst's attitude. He seems to have seized a convenient opportunity of getting rid of a burdensome contract, not because of any real or supposed change of position by reason of the assignment, but because the market price of chalk had risen considerably above the contract price, and he was very willing if he could to reap the advantage of the rise. He must have been cognisant of all that had taken place in the antecedent negotiations involving assignments of the benefit of his contract to nominees, and ultimately to the new company, before final and formal execution, and he continued to deliver throughout this period and for a week after formal notice without objection. His objection when made is put on technical grounds only. Having regard also to the length of time contemplated by the contract for the continuance of the arrangement, he must, I think, have contemplated possible changes by devolution or assignment on both sides. For the reasons I have given, therefore, I feel compelled to differ from the conclusion arrived at by Mathew J. But, as far as I can see, we differ only upon an inference of fact as to what under all the circumstances was the real meaning of the bargain. Was it intended to exclude performance by any person other than the old company itself of their part of the obligation? I have come to the conclusion that it was not. I think, therefore, that the appeals must be allowed.

The President of the Probate Division agrees with this judgment.

COZENS-HARDY L.J. read the following judgment:—This appeal raises the question—whether by reason of a transaction between the two companies which are co-plaintiffs, namely, the Associated Company and the Imperial Company, a contract entered into between the Imperial Company and the defendant Tolhurst has ceased to be operative, or whether the plaintiffs or either of them can now recover damages against the defendant for breach of contract. The terms of the contract of January 5, 1898, have been fully stated by the Master of the Rolls. It is sufficient for me to say that it provided for the delivery of chalk from the defendant's quarries, by means of an existing tramway constructed on the defendant's land, and of a new tramway to be constructed on the adjoining land, at cement works in course of erection on the company's land. The price was 1*s.* 3*d.* per ton, and payments were to be made monthly. The tramway and other works contemplated by the contract have been completed.

The Associated Company was formed for the purpose of acquiring the business of the Imperial Company, and also the businesses of other cement manufacturers. The price arranged for the purchase from the Imperial Company was 180,000*l.*, payable partly in debenture stock and partly in shares of the Associated Company. The sale was carried through by means of a preliminary agreement and a voluntary winding-up of the

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Imperial Company, followed by a conveyance and assignment dated November 30, 1900. By this deed the Imperial Company and its liquidators conveyed to the Associated Company the land and buildings mentioned in the contract and all other the land of the Imperial Company, and assigned to the Associated Company all the goodwill and connection of the business of the Imperial Company, and the sole use of the trade name of the old company and the sole right to represent the new company as carrying on the business of the old company, and the full benefit of all pending trade contracts and engagements in connection with the said business, including expressly the contract of January 5, 1898, and all book debts. The deed contained a power of attorney in the usual form, and a covenant by the new company to indemnify the old company against all proceedings, costs, damages, claims, demands, and liability in respect of the trade contracts and engagements the benefit whereof was thereby assigned.

On December 12, 1900, notice of this was given to the defendant, and the correspondence took place which has been referred to by the Master of the Rolls.

Under these circumstances the plaintiffs contend (1.) that the Associated Company, as the assignees of the contract, can sue the defendant for breach thereof, or alternatively (2.) that the Imperial Company can sue the defendant, there having been no breach on their part, and no abandonment of the contract.

As to the first point, it is clear that at common law no action could be maintained by an assignee for breach of a contract of this nature. There is no privity between the Associated Company and the defendant. But it is said that all this has been altered by s. 25, sub-s. 6, of the Judicature Act, 1873—that there is here an "absolute assignment" of a "legal chose in action" which is effectual to transfer the legal right to such chose in action.

Now, this section relates to procedure only. It does not enlarge the class of choses in action, the assignability of which was previously recognised either at law or in equity. It is designed to avoid the necessity of going first to a Court of

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equity and then to a Court of law. Some limit must be put upon the words used. It is plain that there are many contracts of such a personal nature that they do not admit of being assigned, e.g., a contract to paint a picture. And even where the personal element did not come in, the old Court of Chancery did not, any more than the Courts of Common Law, regard the burthen of a contract as assignable. There was an exception in the case of contracts of which specific performance could be granted. But the contract of January 5, 1898, is not in its nature capable of specific performance. In old days the Associated Company could not have maintained a bill in Chancery to enforce it, and I think the Judicature Act in no way alters the position.

It was further contended that a special and larger right was conferred upon the Associated Company by virtue of ss. 95, 133, sub-s. 7, and 157 of the Companies Act, 1862. But the same considerations which lead to the conclusion that some limitation must be put upon the words "chose in action" in the Judicature Act apply to the use of the words in the Companies Act. It follows that, in my opinion, the Associated Company cannot maintain this action in their own right as assigns of the Imperial Company. I may add that where there has been an attempted assignment it takes very little to establish a tripartite agreement resulting in a novation, and it may well be that, if evidence had been addressed to the point, novation might have been established in the present case.

The second point presents more difficulty. The Imperial Company are plaintiffs. Unless something has happened to destroy it, there is now an existing contract between the Imperial Company and the defendant. The obligations imposed upon the Imperial Company do not involve any personal skill. To receive chalk when delivered on the premises and to pay for the chalk once a month are things which may well be done by a third person by the direction of the Imperial Company. A power of attorney conferred upon the Associated Company would enable the latter to do all this in the name of the Imperial Company. Nor would it be material, for the present purpose, to consider the pecuniary position of the Imperial

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Company so long as no default is made in payment. If a receiver and manager of the undertaking of the Imperial Company were appointed by the Court in a debenture-holders' action, the defendant could not for that reason treat the contract as at an end. The chalk would be ordered, received, and paid for by the receiver in the name of the company, although the business was being carried on for the benefit of the debenture-holders, and although the company had not a penny of assets not covered by the debentures.

Having regard to the number of cases in which receivers and managers are carrying on large businesses the prosperity, or indeed the continuance, of which depends upon trade contracts or contracts for forward delivery of coal or other materials, I think it important that there should be no doubt on this point. Would the voluntary winding-up of the company after the appointment of a receiver and manager make any difference? I think not. But suppose the voluntary winding-up takes place without the previous appointment of a receiver and manager whether the company is insolvent or, as in the present case, not insolvent, I see no reason for holding that the winding-up would of itself terminate the contract, or authorize the defendant to terminate it. The chalk would be ordered, received, and paid for by the liquidator in the name of the company. Does it make any difference that in the course of the winding-up the liquidator transfers the business to a purchaser, with a power of attorney, who orders, receives, and pays for the chalk? The liquidator in the present case received a large consideration from the purchaser. If—which I doubt—it will be relevant to consider the pecuniary position, the liquidator had when this action was commenced ample assets in his hands to discharge all liabilities for chalk, apart from the purchasers' covenant to indemnify. It has been stated that since the assignment and pending this action the liquidator has advertised for claims, and has discharged all that have been sent in, and that he has distributed all or the greater part of the residue of the assets between the shareholders. But the company has not yet been dissolved, and I am not satisfied that it can properly be dissolved under ss. 142 and 143

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so long as its continued existence is necessary to give effect to the contractual obligations of the company towards the purchaser. Unless, therefore, there is something peculiar in the contract itself, I think the defendant cannot treat it as abandoned. This view seems to be consistent with, and indeed to follow from, the decision of the Queen's Bench Division in *British Waggon Co.* v. *Lea.* (1) That case decided two points: (1.) That voluntary liquidation did not in itself incapacitate the company from performing its contract. The Court left open the question as to the position of the parties if and when the company was dissolved. (2.) That the company fulfilled its obligations under the contract by finding a new company (assignee of the contract) able and willing to execute the repairs which the old company contracted to perform. That decision in the year 1880 has never, so far as I am aware, been questioned in a Court of law; and unless we are prepared to overrule it, I think the principles there laid down must govern the present case. So long as the Imperial Company continues to exist it is capable of suing and liable to be sued. The defendant has no right to insist upon the company retaining free assets to meet future liabilities. The company, before and apart from winding-up, might have charged all its assets present and future with a sum far in excess of their value. Such facts, which might reasonably induce the defendant not to enter into a fresh contract with the company, would not justify him in treating an existing contract for forward delivery to the company as at an end.

In the present case the Imperial Company is willing to fulfil, and able to fulfil, its obligations towards the defendant through the Associated Company. In truth, there is no doubt or difficulty as to the money for the chalk being forthcoming.

I have hitherto assumed that there is nothing in the contract which renders it unreasonable to allow the Imperial Company to perform its obligations by deputy. Whether this assumption is well founded is the real and serious difficulty which this case has presented to my mind.

It is contended that the contract itself binds the defendant

(1) 5 Q. B. D. 149.

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to supply, not only a fixed quantity of 750 tons of chalk per week, but also so much more chalk as the Imperial Company may require for the whole of their manufacture of cement upon the land, and that, as the requirements of the Imperial Company have necessarily ceased, it is unreasonable to substitute the requirements of a new and larger company which may impose a greater burthen on the defendant. Now, it is important to observe that no words of succession are found in the contract, although it was to be in force for fifty years. It seems to me that such words must be implied, at least to some extent. The death of the defendant would not terminate it. His executors would be liable to damages unless they fulfilled the obligations to deliver chalk through the agency of his heir or devisee, or other person for the time being owning what are called "his said quarries." The stipulation that the agreement is not to "preclude the said Alfred Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise"—which is a qualification of what might otherwise have been held to be an absolute obligation to deliver chalk to the company—would, I think, be available after Tolhurst's death. In other words, Tolhurst agrees that, so long as there is chalk in his quarries available and suitable, the owner of the quarries will supply it for manufacture of Portland cement on the particular site which was connected with the quarries by a tramway. That was the real and substantial limitation. The personal element did not come into consideration on either side.

No limit is imposed upon the size of the works to be erected on this site, or upon the capital to be embarked in the trade. If the Imperial Company had increased its capital to 5,000,000*l*., and covered every inch of the site with buildings, the defendant could not have complained. And I cannot accept the suggestion that a burthen is thrown upon the defendant greater than he contracted to bear by reason of the large capital of the Associated Company.

I agree with the Master of the Rolls in holding that the plaintiffs are entitled to a declaration that the agreement of January 5, 1898, is a subsisting and valid and binding agreement between the Imperial Company and the defendant, and to consequential relief on that footing.

I have treated the action in which the two companies are co-plaintiffs as the substantial action; but the question raised in the other action is really identical, and both appeals must be allowed.

Appeals allowed.

Solicitors for companies: *Ashurst, Morris, Crisp & Co.*

Solicitors for Tolhurst: *Sismey & Cooke, for Tolhurst, Lovell & Clinch, Gravesend.*

A. M.

[IN THE COURT OF APPEAL.]

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July 29.

THE STEAMSHIP CARISBROOK COMPANY *v.* THE LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY.

Insurance, Marine—General Average—Sacrifice made on Outward Voyage of Ship in Ballast—Liability of Chartered Freight to Contribute.

A ship was chartered to proceed to a foreign port, there load a cargo and bring it home, the chartered freight being payable on delivery of the cargo. While the ship was proceeding in ballast to her port of loading she grounded, and a general average sacrifice was made. She subsequently continued her voyage, loaded her cargo, delivered it, and received the freight:—

Held, that the chartered freight was liable to contribute to the general average sacrifice.

Judgment of Mathew J., [1901] 2 K. B. 861, affirmed.

APPEAL from a judgment of Mathew J. at the trial of the action without a jury, reported [1901] 2 K. B. 861.

By a policy of insurance, dated February 7, 1900, and underwritten by the defendants, the plaintiffs were insured for the sum of 2000*l.* upon the hull and materials, engines and machinery of the steamship *Nestor* from February 1, 1900, to January 31, 1901. By a charterparty dated September 11, 1900, the plaintiffs chartered the *Nestor*, which was therein described as "reported expected to leave Fleetwood about 12th September in ballast, calling at a Bristol Channel port for coals," to Messrs. Strachan & Co. of Savannah. It was thereby provided that the ship should proceed to Savannah, and there, having discharged her cargo, if any, load a cargo of cotton and proceed therewith to Liverpool, Manchester, or Bremen as directed; the freight to be paid on unloading and right delivery of the cargo. The vessel sailed on September 13 from Fleetwood, in ballast; she did not call at any Bristol port, and arrived on the night of October 3 in Savannah Roads. On the following day she was proceeding up the river when she grounded, and in the efforts made to get her off she sustained damage. She was eventually got off and the damage repaired, and she proceeded to her loading berth, loaded her cargo, brought it home, and received the chartered freight. An average statement of the repairs of the ship was prepared, but the average adjusters in preparing it omitted to make the chartered freight contribute. The plaintiffs having sued the defendants on the policy for the cost of the repairs, the defendants contended that the average statement was incorrect, and that upon a proper adjustment of the loss the plaintiffs were liable to make contribution in respect of the freight under the charterparty.

The learned judge gave judgment for the defendants.

The plaintiffs appealed.

Carver, K.C. (with him *D. Stephens*), for the plaintiffs. The chartered freight which would have been earned on the homeward voyage is not liable to contribute to the general average sacrifice in respect of the damage to the ship sustained on the outward voyage. Freight agreed for, but not earned upon the particular voyage, cannot be made to contribute in general average. The charterparty affected the homeward voyage only, and on the outward voyage there was no other interest in existence than that of the plaintiffs, the shipowners; there can be no such thing as general average unless there are two separate interests in the voyage: *The Brigella* (1), per Gorell

(1) [1893] P. 189.

Barnes J., though his view was not followed in *Montgomery & Co.* v. *Indemnity Mutual Marine Insurance Co.* (1)

The first question is, What are the time and place at which the contribution ought to take place, or to be fixed? Clearly at the end of the voyage. The principles applicable are discussed in Arnould on Marine Insurance, 7th ed. ii. 974. They are worked out in *Fletcher* v. *Alexander* (2), where part of a cargo of salt had been jettisoned, and the remainder damaged, and it was held that the place of adjustment for purposes of general average was the end of the voyage. The voyage means the voyage in progress at the time the damage occurred, with the interests then in existence.

This ship was valued at Savannah, and the valuation included all her future freights; her future possibilities of earning freight are part of her value, and to make the ship contribute in respect of homeward freight is to make her contribute twice over. *Simonds* v. *White* (3) is also an authority that the place of adjustment is the port of discharge, and that the general average loss is to be calculated in accordance with the law of the port of discharge—that is, the time at which the co-adventurers in the particular voyage get dispersed; the next voyage is one with which those interested in the outward voyage have nothing to do.

A charterer who puts cargo on board for the homeward voyage has nothing at stake on the outward voyage. No freight was being earned on the outward voyage, and the only thing that could be saved was the ship.

Williams v. *London Assurance Co.* (4) is distinguishable. The facts were different; it was a round voyage, payment of the whole of the freight being conditional on completion of the whole voyage; a general average sacrifice occurred on the outward voyage, and it was held that the whole of the freight was liable to contribute. The adjustment was in London at the end of the round voyage, which deprives the decision of all authority when it is sought to apply it to a case where the place of adjustment was the outward port of destination. That case was criticised in Benecke's Principles of Indemnity, p. 315, and in Arnould on Marine Insurance, 2nd ed. ii. p. 955, where it is said that it seems doubtful whether the decision can, on principle, be supported. Willes J. in *Potter* v. *Rankin* (1) speaks of freight not to be earned during the voyage insured as not subject to general average either of ship or cargo; and this view is confirmed in the opinion of Blackburn J. when the case was before the House of Lords. (2) [He also referred to Bailey on General Average, ed. 1851, p. 152, and Lowndes on Average, 4th ed. p. 310.]

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(1) [1901] 1 K. B. 147.

(2) (1868) L. R. 3 C. P. 375.

(3) (1824) 2 B. & C. 805; 26 R. R. 560.

(4) (1813) 1 M. & S. 318; 14 R. R. 441.

J. A. Hamilton, K.C., and *F. D. MacKinnon*, for the defendants. There were not in this case, as suggested, two voyages, one to Savannah and one back, but one voyage out and back. As a fact, from the commencement of the voyage the ship was earning the chartered freight, which was not estimated per ton of weight delivered, but per net registered tonnage of the ship. In that voyage, if the ship had been lost the owner could not have earned freight because the ship is named in the charterparty, and he could not have substituted another vessel. As a matter of law, the ship was earning freight over the whole voyage: *Barber* v. *Fleming* (3); for, as Cockburn C.J. pointed out, that is what gives the owner an insurable interest on the chartered freight when the ship starts on the voyage. If a sacrifice is made to save the ship and freight, both must contribute.

The proposition put forward on the other side is that the decision in *Williams* v. *London Assurance Co.* (4) was wrong; but it was confirmed by Lord Campbell and the Court of Queen's Bench in 1857 in *Moran* v. *Jones* (5), and there was evidence at the trial that it is the practice of average adjusters in such a case to make freight contribute. *Svendsen* v. *Wallace* (6) shews that the practice of adjusters, though not binding, should not be put aside unless inconsistent with law and justice; and the rules as to average contribution are described as "rules rather of convenience than of positive law" by Bovill C.J. in *Fletcher* v. *Alexander*. (1) The real difficulty of the text-writers has been as to the application of the principle laid down in *Williams* v. *London Assurance Co.* (2), which followed the case of *The Progress*. (3) That was a case of salvage, but the principle is applicable to the saving of freight. There is no question in this case as to ulterior freight which was not being earned at the time of the accident, which was the point raised by Willes J. in *Potter* v. *Rankin*. (4) On principle chartered freight should contribute to the loss; and even if there were a doubt on this point, it is too late to upset the authority of the earlier cases.

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(1) (1868) L. R. 3 C. P. 562, at p. 567.

(2) (1873) L. R. 6 H. L. 83, at p. 115.

(3) (1869) L. R. 5 Q. B. 59.

(4) 1 M. & S. 318; 14 R. R. 441.

(5) (1857) 7 El. & B. 523.

(6) (1885) 10 App. Cas. 404.

D. Stephens, in reply. On the voyage during which the loss occurred Savannah was the port of destination. The rule laid down in *Williams* v. *London Assurance Co.* (2) is not a reasonable one, because under it, if the vessel had been lost on her way to Savannah, the shipowner would be called on to contribute in respect of chartered freight which he never received. *Barber* v. *Fleming* (5) was the case of a round voyage. In the case of *The Progress* (3) there must have been cargo on board.

Collins M.R. This an appeal from a decision of Mathew J. The action was brought upon a policy of insurance by the owners of the ship against the underwriters on hull, and the underwriters have sought to set off against the claim on the ship a sum payable, as they say, by the owner of the hull as also owner of the freight in respect of general average contribution due from him in respect of the freight. The question is whether the freight in this case is the subject-matter of an average contribution or not.

The vessel, which is called the *Nestor*, was chartered to sail from Fleetwood to Savannah, and she was to be entitled to call at a port in the Bristol Channel for coals, an option of which she did not avail herself. She was then to proceed to Savannah, and having discharged her cargo, if any, was to load a cargo at Savannah, and proceed directly from Savannah to Liverpool,

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(1) (1868) L. R. 3 C. P. 375, at p. 383.

(2) 1 M. & S. 318; 14 R. R. 441.

(3) (1810) Edw. A. R. 210.

(4) L. R. 3 C. P. 562, at p. 567.

(5) L. R. 5 Q. B. 59.

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Manchester, or Bremen. At Savannah she loaded the chartered cargo, and came back safely to a port in England. On her way out she met with a misfortune which necessitated a general average sacrifice; that is to say, she came upon a sandbank, and the ship's machinery and screw had to be put in operation in order to get her off, and that did damage which was, in the result, a general average sacrifice. The question was whether the owner of the freight should be called upon to contribute in respect of the freight payable on the accomplishment of the round voyage. It has been held by Mathew J. that the only freight payable under this charterparty was at risk; that it was saved by the sacrifice, and that therefore it was one of the contributing factors to the general average loss. That is the position which is questioned by the appellants in this case. It is said that where there is a continuous voyage, the vessel having to go out to a port which they call the port of destination, to load there and come back with a cargo from that port, which is the only cargo that is carried for a freight, which freight is only payable upon the safe delivery of that cargo in this country—that then you cannot take that freight into consideration as a contributing factor where the loss occurs on the voyage out. This contention is, at the outset, met by the authority of a case decided in 1813, *Williams* v. *London Assurance Co.* (1) That case, if it is good law, covers the case before us; in fact, it is a stronger case. The head-note is this: "Action on a policy on ship at and from London to the East Indies, until her arrival at her port of discharge on the outward voyage. Loss by perils of the seas. Ship was chartered from London to the East Indies, there to deliver her outward cargo and return thence with a cargo for England into the Thames, and there make a true delivery, &c.; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at London and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton; the ship sailed on the voyage insured, and in the course of her outward voyage incurred an average loss, but was repaired and afterwards performed her voyage, and the

(1) 1 M. & S. 318; 14 R. R. 441.

freight was received: *Held*, that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution." There there was in point of fact a cargo carried out, though there was no freight payable unless and until a cargo was carried home, yet it was held that the only freight payable—the freight payable on the complete accomplishment of the whole voyage—was a contributory factor to the general average sacrifice. Therefore that case is directly in point; in fact, it goes beyond what is necessary to support the judgment of the Court below in this case. The authorities do not stop there; for in the case of *Moran* v. *Jones* (1), decided in 1857, it seems to me that the same point was, I should say, decided; but whether decided or not, it was adopted as law by the unanimous opinion of the full Court of Queen's Bench. That case is thus stated in the head-note: "The ship was chartered to proceed from Liverpool to a foreign port and there load a return cargo, for freight payable on delivery of the home cargo. She took on board an outward cargo and sailed. She was driven on a bank by a storm near Liverpool, and the cargo was rescued from her, and carried to Liverpool, and there warehoused; the ship still remaining ashore in a situation of peril. Some days afterwards the ship was got off and taken to Liverpool, where she was repaired, and again took the cargo on board and proceeded on her voyage. It was agreed between the parties in the case that the freight was to be taken as liable to contribute to general average; and the question for the Court was only whether the expenses incurred after the goods were in Liverpool, in getting the ship off, without which she could not have proceeded on her voyage or earned the chartered freight, were general average to which ship, freight and cargo were to contribute, or were chargeable to ship alone, or were chargeable on any other principle. *Held*, that, as the ship and freight were both in peril and both saved, the freight must contribute as well as the ship, supposing the cargo not to contribute. But the Court drew the inference of fact that the whole saving of the cargo and ship was one continued transaction; and

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(1) 7 El. & B. 523.

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on that hypothesis, *held*, that the expenses were general average, to which ship, freight and cargo must contribute." I think the head-note perhaps expresses rather more strongly than is necessary the condition of the case as to the liability of the cargo to the general average, because it certainly seems from the argument in the case that the Court and the counsel both deal with the question of the liability of the freight as not being settled by agreement, but as being left to the Court to decide. The case of *Williams* v. *London Assurance Co.* (1) was cited in argument. Lord Campbell, in a considered judgment, said: "In this case we never doubted that the defendant, as underwriter on the freight, was liable for a contribution to general average in respect of the sum of 643*l.* 11*s.* 1*d.*, the expenses incurred in order to get the ship off from the bank on which she was stranded, whether the goods were or were not liable to contribute to this portion of the loss. It is admitted that the ship could not have been got off and completed her voyage unless these various expenses had been incurred. Therefore, without these expenses, there would have been a total loss of the freight, amounting to the sum of 6750*l.* Even if the goods were not liable to contribute, on the ground that they were not exposed to any peril when these expenses were incurred, still the freight, which was then exposed to peril and has been saved, ought to contribute as if there never had been any goods on board, and the ship had sailed from Liverpool to Callao in ballast." Those words seem to me directly in point in this case, and, whether they are a decision of the Court or not, they are, at all events, an expression of opinion of the full Court of Queen's Bench judges approving the principle of the earlier case. The case decided in 1813 was not the earliest case, for in 1810 a case involving a similar principle had been decided in the Admiralty Court by Lord Stowell; that was *The Progress*. (2) Ships were in the harbour of Oporto, and were captured by the French and recaptured by the English. Lord Stowell said that he had to determine three points, the third being (3):

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(1) 1 M. & S. 318; 14 R. R. 441.
(2) Edw. A. R. 210.
(3) Edw. A. R. at p. 218.

"whether a salvage is due on the freight of ships taken up in this country, and sent to Oporto to bring away these cargoes, which they have been enabled to do by the act of recapture." And he continued: "these vessels, which had gone to Oporto from this country under a charterparty for one entire voyage out and home, and had already performed the outward voyage, were in the course of earning their freights at the time of capture; they had actually broke ground, as the phrase is, and had entered upon that adventure out of which their profits were to arise. While lying in the harbour of Oporto they were in the course of earning their freights; they were *in itinere*, and the salvage is as clearly due as if they had been captured at sea. If there had been two distinct voyages, as is sometimes the case in charterparties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect; but where a ship goes out under a charterparty to proceed to her port of destination in ballast, and to receive her freight only upon her return, the Court is not in the habit of dividing the salvage. . . . where a ship goes out under a charterparty for the voyage out and home, salvage is due upon the whole freight."

It is said that there is no analogy between a question of salvage claim and a question of general average loss; but it seems to me that there is an analogy. In each case the question is what interests have been actually at risk and have been saved by the sacrifice; in the one case the average sacrifice, in the other the labour and the expenses of the person who salves. What is the factor which ought to come into consideration in respect of freight? It seems to me the learned judge had practically the same question to decide in that case as the general average adjuster has to decide in this case, and his decision is a clear authority that in the case of a round voyage, where the freight is only payable on the ultimate arrival of the ship with its cargo on board, the freight is a contributing factor. Before departing from the authorities, there is also the decision of the Court of Admiralty in America, which is a very valuable contribution to the discussion. In *The Brig Mary* (1) the learned judge,

(1) (1842) 1 Sprague's Decisions in Admiralty, 17.

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after considering the opinions of the text-writers and the decision in the English case of *Williams* v. *London Assurance Co.* (1), came clearly to the opinion that, notwithstanding the observations of the text-writers, the decision in that case was right.

Looking at the matter in point of principle and apart from authority, it would seem to me that the freight should be one of the contributories in such a case as this. The vessel in a round charter such as this is earning the only freight that is payable from the moment it breaks ground down to the time it delivers the cargo at the ultimate port. It is in process of earning that freight just as much before the goods are put on board as after, and just as its ability to earn it would be defeated if the adventure were stopped short by some peril a fortnight after it started, so also it would be defeated if it met with a similar peril one day before it could reach the port of destination, and, where there is a general average sacrifice ten days after she starts, it seems to me there can be no distinction of principle between that sacrifice and a sacrifice occurring two days before she would arrive. What is at risk in both cases is the same, namely, the ability of the ship to consummate the whole undertaking in safety. No doubt there are differences of convenience where there is a cargo carried to the intermediate port as distinguished from the case where no cargo is carried to the intermediate port, and if cargo is carried under a charter which entitles the ship to a freight at the intermediate port, one can easily understand why the average adjusters should make a difference and limit the contribution in respect of such an average sacrifice, on what I may call the first part of the voyage, to the freight which was to be earned at the first port where the cargo was to be discharged. No doubt the principle laid down in *Williams* v. *London Assurance Co.* (1) is open to some criticism, but it seems to me, on the whole, to be a sound working practical rule, and, speaking for myself, I am not able to find any better one. It seems to me the difficulties suggested by those writers who have questioned the rule adopted in *Williams* v. *London Assurance Co.* (1) are greater than the difficulties of the rule itself. But I think, also, that it has

(1) 1 M. & S. 318; 14 R. R. 441.

been shewn that the objections are really not so formidable as they might at first appear. They are objections pointing to the difficulty of estimating the proper value to be put upon the freight at risk, rather than difficulties arising from taking it into consideration at all. In such a case as this, where there is no cargo taken out and the ship goes out in ballast to some intermediate place and there loads a cargo, I do not understand it is questioned that in some form or other the freight to be earned upon the round voyage ought to be taken into consideration, although it is suggested it ought to be apportioned, and somehow or other an estimate arrived at of what freight would be taken to be earned, if earned at all, at the intermediate place. I think notwithstanding, whatever may be the true view, and whether these writers are right or wrong in their views as to what ought to be the law, the law laid down in *Williams* v. *London Assurance Co.* (1) is the law in this country. It was decided as far back as 1813 by a Court of which Lord Ellenborough was the head, and a year or two after a case decided by Lord Stowell, which, to my mind, involved the same principle. It was approved and followed in 1857 in a Court of Queen's Bench presided over by Lord Campbell, and consisting of eminent lawyers very familiar with this particular class of law. It has not been questioned in any decided case in which it was cited and discussed. The only objection made to it is one based upon some observations of Sir James Shaw Willes in the case of *Potter* v. *Rankin.* (2) I need not say that any observations falling from him with regard to assurance law I should treat with the most absolute and unfeigned respect; but it seems to me, when the circumstances of the case in which those observations were pronounced are considered, that they were merely dicta so far as they have to do with the discussion of this case. The facts did not raise this point for discussion, and neither was the case of *Williams* v. *London Assurance Co.* (1) cited or commented upon, and I think the learned judge's mind was addressed to a different set of circumstances, and not to such circumstances as are now in question before us, and therefore

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(1) 1 M. & S. 318; 14 R. R. 441.

(2) L. R. 3 C. P. 562, at p. 567.

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these observations are to be taken, as all such observations ought to be taken, secundum subjectam materiem, and it was not and could not have been present to the mind of the learned judge that he was in any way impugning the decision in *Williams* v. *London Assurance Co.* (1) The same observation applies, and I think with equal force, to Blackburn J.'s confirmatory opinion in the House of Lords, when we remember that he himself was counsel in the case of *Moran* v. *Jones* (2), where *Williams* v. *London Assurance Co.* (1) was cited, and where the matter was discussed, and he could not have forgotten it, and cannot be conceived to have had in his mind any intention of impugning its authority in the observations he made. However, that is the state of the authorities; we have the two decisions of the full Court of Queen's Bench never discussed or drawn in question in any Court of law in this country until now. In that state of the law we are asked to overrule those authorities, followed, as they have been, by average adjusters all this time, in order to give effect to some doubts of an ambiguous and difficult character suggested by text-writers more or less eminent. On these grounds I think I may adopt in terms the judgment of the learned judge below. In my opinion this appeal should be dismissed.

STIRLING L.J. I am of the same opinion. We have had brought before us many considerations, which would be well worthy of being weighed if the question which was being discussed were now brought before the Courts of this country for the first time, or if we were engaged in framing a code of rules to be adopted with reference to matters of this description. But our duty is to administer the law as we find it, and it is admitted that, in order that the appellants may succeed, the case of *Williams* v. *London Assurance Co.* (1), decided in 1813 by a Court consisting of Lord Ellenborough C.J., Le Blanc J., and Bayley J., must be overruled. Now, that case not only was decided a long time ago, but has never been judicially dissented from. On the contrary, it has been followed, as it appears to me, by Lord Campbell and the Court of Queen's

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(1) 1 M. & S. 318; 14 R. R. 441.

(2) 7 El. & B. 523.

Bench in the case of *Moran* v. *Jones*. (1) Further, it has been acted upon, so far as it appears, down to the present time by average adjusters, and their practice—regard being had to the long time it has been established—in itself raises a strong presumption that the rule which is there laid down is not one which works injustice, or is found in practice to be unreasonable. Now, what have we against this? No doubt the decision has been criticised by text-writers; but the only judicial authority which can be adduced is what is said by Willes J. in the case of *Potter* v. *Rankin* (2), a statement which is accepted as accurate by Blackburn J. in advising the House of Lords in the same case. Now, two observations are to be made with reference to what was said by Willes J. The facts of *Potter* v. *Rankin* (2) were not the same as in the present case, and as in the case of *Williams* v. *London Assurance Co.* (3); the outward and homeward voyages were not, as here, dealt with by one and the same charter; but the homeward voyage was the subject of a totally distinct and separate charterparty from that which was the subject of the outward voyage; and, further, neither in the Court of Common Pleas nor in the House of Lords was the case of *Williams* v. *London Assurance Co.* (3) cited at all. It is impossible for me to suppose that either of the learned judges meant, without citing and dealing with the case, to overrule a decision which had been well established at the time when they spoke. For these reasons, and also for those given by my Lord and Mathew J., I think the decision ought to be affirmed.

COZENS-HARDY L.J. I am of the same opinion, and I have nothing to add.

Appeal dismissed.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

A. M.

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(1) 7 El. & B. 523.
(2) L. R. 3 C. P. 562, at p. 567.
(3) 1 M. & S. 318; 14 R. R. 441.

1902
Jan. 31;
April 16.

MILLER *v.* LAW ACCIDENT INSURANCE COMPANY.

Insurance (Marine)—Policy—"Restraint of Princes and People"—Prohibition against Entry into Country of Diseased Cattle.

The mere operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is not a restraint of princes or people within the meaning of a Lloyd's policy of marine insurance.

Semble, a warranty in a policy of marine insurance against "capture, seizure, and detention" operates to release the insurers from liability under the words "arrests, restraints, and detainments of kings, princes, and people" in the body of the policy.

Action tried in the Commercial Court before Bigham J. without a jury.

The following statement of facts is taken in substance from the written judgment of the learned judge.

The action was brought to recover the amount of a total or partial loss of cattle under a Lloyd's policy of marine insurance; the voyage was from Liverpool to Monte Video $\frac{\text{and}}{\text{or}}$ Buenos Ayres. The risks insured against were described in the usual way, and included "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever . . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises or any part thereof." It was under these words that the claim was made, and the question for determination was whether the facts of the case brought it within the meaning of the words. At the foot of the policy was the clause, "Warranted free of capture, seizure, or detention, and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, warlike operations, and all risks of riots and civil commotions, whether before or after declaration of war."

The plaintiff shipped a number of bulls by the steamer *Bellevue*, to be carried from Liverpool to Buenos Ayres, and, having made the shipment, effected the policy sued upon. Many months before the shipment was made the Argentine

Government had passed a decree forbidding the entry of animals suffering from contagious diseases or coming from countries where such diseases prevailed. The decree contained articles describing the diseases and providing how animals suspected of being affected were to be dealt with. The *Bellevue* arrived at Buenos Ayres on September 10, 1900, and the cattle were duly inspected on board the vessel by Argentine officials, with the result that the Ministry of Agriculture came to the conclusion that they were suffering from disease within the meaning of the decree, and they ordered the vessel to leave the port; their order provided that the captain, if he so wished, might tranship the cattle to another vessel outside the limits of the port for carriage to some other destination. On the next day, September 11, the Ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom until further notice. As to this, the learned judge at the trial found as a fact that the animals were suffering from disease within the meaning of the decree, and that the order forbidding their landing was lawfully made by the Argentine authorities. In obedience to this order, the *Bellevue* left the dock at Buenos Ayres, and on September 14 the cattle were transhipped into lighters at Santiago, a place outside the limits of the port. On the same day notice of abandonment was given. The cattle remained in the lighters for some days, when a ship called the *Sallust* was found to take them on to Monte Video, at which place, after being forty days in quarantine, they were landed and sold at a considerable loss.

J. A. Hamilton, K.C., and *Maurice Hill*, for the plaintiff. The plaintiff is entitled to claim for a constructive total loss of all his stock; he was deprived of all control over it by the acts of the Argentine authorities, whose act in prohibiting the landing of the cattle at Buenos Ayres was a restraint or detainment of people within the meaning of the policy. The case is concluded by *Rodocanachi* v. *Elliott* (1), where the hostile detention of goods within a besieged city was held to be a restraint of princes; so too, in *Nobel's Explosives Co.* v.

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(1) (1874) L. R. 9 C. P. 518.

Jenkins (1), it was held that the act of the master in landing goods short of their destination under a reasonable belief that the ship would be seized if he proceeded to the port of discharge was covered by the clause in the policy insuring against restraints of princes. And in America quarantine regulations which interfere with the charter engagements of a vessel have been held to come within the expression "restraints of people": *The Progreso.* (2) The case of *Brunner* v. *Webster* (3) is not an authority to the contrary, for in that case there had been no prohibition in fact of the importation of the goods.

Scrutton, K.C., and *Loehnis*, for the defendants. The plaintiff is not entitled to recover. There was no such prohibition as would amount to a restraint of princes or people within the meaning of the policy. The evidence proves no more than that it was the ordinary law of the Argentine Government that animals suffering from contagious disease were not allowed to enter the country, and the so-called prohibition was nothing more than the machinery for enforcing the ordinary law. The ordinary law of a country is not a restraint of princes or people, which means a forcible interference with a man's goods or a taking of them manu forti: *Finlay* v. *Liverpool and Great Western Steamship Co.* (4) That case is in point, for there can be no difference between administering the ordinary law of the country in a Court of justice, as was there done, and the administrative action of the proper authorities which is not questioned in Court. Had the plaintiff succeeded in landing his cattle, they would have been seized and slaughtered by the Argentine authorities; the plaintiff would then not have been entitled to recover on the ground of the decree being a restraint of princes or people, even if that had been its legal effect, for there would then have been a seizure within the warranty against capture and seizure, and the underwriters would have been absolved from liability: *Cory* v. *Burr.* (5) The measures taken by the plaintiff to avoid an apprehended seizure by taking away the cattle to Monte Video did not constitute a

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(1) (1896) 1 C. C. 436.

(2) (1892) 50 Fed. Rep. 835.

(3) (1900) 5 C. C. 167.

(4) (1870) 23 L. T. (N.S.) 251.

(5) (1883) 8 App. Cas. 393.

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peril insured against: *Hadkinson* v. *Robinson* (1), where the loss of a voyage in consequence of the port of destination being shut against the insured ship was held not to be a loss within the policy: *Lubbock* v. *Rowcroft.* (2)

[BIGHAM J. In those two cases the cargo had not been taken out of the possession of the insured; he had never lost the dominion over it.]

Assuming the existence of a peril which amounted to a restraint of the cattle, and that the cattle deteriorated in value during the restraint, there would no doubt be a partial loss recoverable under the policy; but there is no evidence of any such deterioration. The suing and labouring clause has no application to the present case. No doubt where a peril within the meaning of the policy is imminent, the assured may incur expense to avoid it; but what was imminent in the present case was a liability to seizure, for which the defendants were not responsible under the policy. In all the cases in which the assured has recovered for a loss occasioned by restraint of princes there has been an occlusion or shutting in of the goods, not a mere exclusion or shutting of them out.

[They also cited *Ruys* v. *Royal Exchange Assurance Corporation* (3); *Field Steamship Co.* v. *Burr.* (4)]

J. A. Hamilton, K.C., in reply. It was not the mere automatic application of the ordinary law of the country that prevented the landing of the plaintiff's cattle at Buenos Ayres; that was the result of the prohibition of September 10, which was something more than a simple application of the previously existing decree. It is clear that a loss of voyage, in the sense of a practical impossibility of ever sending the goods on to a port of destination, may effect a constructive total loss of the goods: Arnould on Marine Insurance, 7th ed. ss. 1142, 1143; *Barker* v. *Blakes* (5), where the voyage was frustrated by a blockade of the port of destination; *Cologan* v. *London Assurance Co.* (6), where, in consequence of a scarcity of food at an intermediate port, an embargo was laid on the goods, and the voyage thereby defeated. And the same doctrine was treated as clear law by the Exchequer Chamber in *Rodocanachi* v. *Elliott.* (1) The case is distinguishable on its facts from such cases as *Hadkinson* v. *Robinson* (2), where the ship was endeavouring to avoid the risk of running a blockade of the port of destination; and *Lubbock* v. *Rowcroft* (3), where the port of destination was temporarily in the hands of an enemy; here the ship and cattle were actually in port and in the power of the Argentine authorities, who enforced their direct prohibition against the landing of the cattle. Assuming that there was a restraint within the meaning of the policy, the warranty affords no answer to the plaintiff's claim; there was no detention within the meaning of the clause warranting the cattle free from capture, seizure, or detention; that clause has not the effect of deleting the words in the body of the policy, and the suggestion to that effect of Phillimore J. in *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (4) was merely a dictum which was unnecessary to his decision. There may be detention by preventing a ship or goods from coming into a place as much as by preventing them from leaving it. Even assuming that there was no restraint of princes or people within the meaning of the policy, there was an unexpected interruption and prolongation of the voyage by which the plaintiff was put to extra cost for fodder in order to keep the cattle alive, and these expenses he is entitled to recover from the defendants under the suing and labouring clause: *The Pomeranian.* (5)

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(1) (1803) 3 B. & P. 388; 7 R. R. 786.

(2) (1803) 5 Esp. 50; 8 R. R. 830.

(3) (1897) 2 C. C. 201.

(4) [1899] 1 Q. B. 579.

(5) (1808) 9 East, 283; 9 R. R. 558.

(6) (1816) 5 M. & S. 447; 17 R. R. 390.

Cur. adv. vult.

April 16. The following written judgment was delivered by

BIGHAM J. [After stating the facts as above, the learned judge proceeded:—] It is in these circumstances that the plaintiff claims for a total or partial loss, alleging (to follow the words of the pleader) that the prohibition of the landing constituted a restraint of people within the meaning of the policy. The right to recover depends upon whether the loss is directly due to a restraint of people. I am of opinion that it is not. It is not necessary for me to give an exhaustive definition of the expression "restraint of people," and I shall not attempt to do so. It is sufficient to say that the mere operation of an ordinary municipal law affecting or preventing the delivery of the insured goods at their destination is no "restraint of people" within the meaning of the policy. As in the case of perils of the sea, there must be something violent and out of the ordinary course of things before the peril is brought within the meaning of the policy. The maker of a bill of lading protects himself by an exception of the acts and restraints of princes. Such an exception was held in *Finlay* v. *Liverpool and Great Western Steamship Co.* (1), not to cover the case of a judgment in a Court of law of the United States of America directing the goods to be delivered to third parties who had claimed them. "The acts and restraints of princes," said Martin B. in that case, "mentioned and provided against in the bill of lading, have reference to the forcible interference of a state or of the government of a country taking possession of the goods manu forti, and do not extend to the legal proceedings which, it is alleged in the plea, afterwards took place in the Courts at New York." So in the present case the words do not, in my opinion, cover the operation of the ordinary law of the land, but relate only to some violent departure from the ordinary course of things. The plaintiff relied upon the authority of *Rodocanachi* v. *Elliott*. (2) In that case goods were in transit from Marseilles to London. They had to pass through Paris, and on their way they came within the lines of the German army, by which Paris was then completely invested. In consequence of this state of things the goods could not be moved. This was held to constitute a restraint of princes. Bramwell B., in delivering the judgment of the Exchequer Chamber, says: "But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no

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(1) L. R. 9 C. P. 518, at p. 522.

(2) 3 B. & P. 388; 7 R. R. 786.

(3) 5 Esp. 50; 8 R. R. 830.

(4) [1901] 2 K. B. 919. The decision has recently been affirmed in the Court of Appeal, ante, p. 489.

(5) [1895] P. 349.

(1) 23 L. T. (N.S.) 251.

(2) L. R. 9 C. P. 518.

specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army." This shews that the Court was of opinion that the goods were, for all effective purposes, seized by the German army and taken out of the control and disposition of the owners; it was by the forcible, and therefore by the violent, act of the German army that the goods were prevented from reaching their destination. No other view of the facts in that case could have been taken, and having regard to that view no other conclusion could be arrived at than that the plaintiffs had lost their goods by a restraint of princes. But in the present case no force of any kind was used; the captain was required to obey the ordinary law existing in the country at the time when the goods arrived, and he obeyed it. To call the resulting consequences a loss by restraint of people or princes is, in my opinion, to give to the expression a meaning which it was never intended to bear.

A further point arose in the case, on which also I think that I ought to give judgment for the defendants, although, having regard to my decision on the first point, it is not really necessary to consider it. The policy contained the following clause: "Warranted free of capture, seizure, and detention." It was said that this exception ought not to be interpreted to include "restraint." I think, however, that the very object of this exception is to free the underwriters from liability under the words "arrests, restraints, and detainments" in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before—and to what, if not to the words I have mentioned? An attempt was made to bring the loss within the general words, "all other perils, losses, and misfortunes that shall come to the damage of the goods"; but as to this it is sufficient to say that these words only cover losses of a kind similar to

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those particularly enumerated in the previous part of the policy, and do not include a loss of an exceptional kind like that which has happened in this case.

Judgment for defendants.

Solicitors for plaintiff: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

ISLINGTON CORPORATION *v.* LONDON SCHOOL BOARD.

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June 11.

London—Poor-rate—Lands taken Compulsorily—Deficiency in Assessment to Poor-rate—Liability of Promoters of Undertaking—General Rate—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 10, *sub-s.* 2.

By s. 133 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), promoters of undertakings to whom that Act applies who become possessed of lands liable to be assessed to the poor-rate are to make good the deficiency in that rate caused by their taking or using the lands for the purposes of their works until their works are completed and assessed to the poor-rate.

By s. 10, sub-s. 2, of the London Government Act, 1899, the general rate and the poor-rate are to be assessed, made, and levied together by the borough council as one rate, termed the general rate, which is to be assessed, made, collected, and levied as if it were the poor-rate:—

Held, that promoters who in the exercise of their statutory powers had compulsorily taken land in London since the coming into operation of the London Government Act, 1899, were only liable to make good the deficiency in so much of the general rate as represented the poor-rate or anything chargeable on that rate, and were not liable to make good the whole of the deficiency in the general rate.

CASE stated by consent under Order XXXIV., r. 1, in an action brought for—(1.) A declaration that under the Lands Clauses Consolidation Act, 1845, and the London Government Act, 1899, the defendants were liable to make good to the plaintiffs the deficiency in the assessment to the general rate as defined by the last-mentioned Act on a house and lands known as

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No. 7, Barnsbury Park, Islington, by reason of those premises having been taken and used for the purposes of the works of the defendants, until the works should be completed by the defendants and assessed to the general rate. (2.) The sum of *5l.* 7*s.* 7*d.*, being the second instalment of a general rate made September 28, 1901, for the period ending March 25, 1902, and payable on January 1, 1902.

By s. 133 of the Lands Clauses Consolidation Act, 1845, "If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's-rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's-rate, be liable to make good the deficiency in the several assessments for land tax and poor's-rate by reason of such lands having been taken or used for the purposes of the works. . . ."

By s. 20 of the Elementary Education Act, 1870, as amended by s. 15 of the Elementary Education Act, 1873, it is enacted that with respect to the purchase of land by school boards for the purposes of the Elementary Education Act, 1870, the following provisions shall have effect—that is to say, (1.) The Lands Clauses Consolidation Act, 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section the special Act shall be construed to mean the Act confirming an order of the Education Department for the purchase of land together with the Elementary Education Act, 1870, and the promoters of the undertaking shall be construed to mean the school board; and (2.) The school board before putting in force any of the powers of the said Lands Clauses Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement are to give the notices prescribed by s. 20 of the Elementary Education Act, 1870; and by the same section the Education Department may make an order authorizing the school board to put in force with reference to the land referred to in such order the powers of the Lands Clauses Consolidation

Act, 1845, and the Acts amending the same with respect to the purchase and taking of land otherwise than by agreement; but no such order is to be valid until it is confirmed by Parliament.

By a provisional order duly made and confirmed by the Education Department Provisional Order Confirmation (London) Act, 1898 (61 & 62 Vict. c. cciv.), after s. 20 of the Elementary Education Act had been complied with, the Education Department ordered that the defendants be authorized to put in force the powers of the Lands Clauses Consolidation Act for the purchase and taking of lands otherwise than by agreement with reference to (inter alia) the premises known as No. 7, Barnsbury Park aforesaid.

On or about December 12, 1900, the defendants under the powers conferred by the order became possessed of the said premises, which consisted of a private dwelling-house and garden which were then liable to be assessed to the poor's-rate, and were not exempt from that or any rate or liable to be assessed thereto at a less amount than other hereditaments, and in respect thereof the defendants became the promoters of an undertaking within the meaning of the said s. 133; and the said Confirmation Act, together with the Elementary Education Act, 1870, became the special Act within the meaning thereof; and the works within such meaning in connection with the said premises have not been completed and assessed to such poor's-rate.

By virtue of the London Government Act, 1899, the plaintiffs became and are the borough council for the borough of Islington, and the collectors of the assessment for poor's-rate mentioned in s. 133.

By s. 10, sub-s. 1, of the London Government Act, 1899, it is enacted that a scheme under that Act (which scheme was duly made and passed as regards the borough of Islington) shall provide for all expenses of a borough council being paid out of the general rate and for the discontinuance of a separate sewers rate and a separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to

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be assessed thereto at a less amount than other hereditaments; and by sub-s. 2 of the same section it is enacted that after the appointed day (which has long since passed) the general rate and the poor-rate shall be assessed, made, and levied together by the borough council as one rate, which shall be termed the general rate, and shall be assessed, made, collected, and levied as if it were the poor-rate, and all enactments applying or referring to the poor-rate shall, subject to the provisions of this Act as to audit, be construed as applying or referring also to the general rate. A copy of the scheme was annexed to and formed part of the case.

By reason of the lands having been taken and used by the defendants for the purposes of their works, there was prior to September 28, 1901, and still is, an entire deficiency in the assessment for the general rate in respect of the said lands, and the plaintiffs as such collectors have demanded from the defendants 5*l.* 7*s.* 7*d.*, the amount of such deficiency, for the period ending March 25, 1902; but the defendants have neglected to pay the same. The proportion of such 5*l.* 7*s.* 7*d.* representing that portion of the general rate which is applicable to the relief of the poor is 3*l.* 13*s.*

The deficiency has been computed according to the rental at which the lands with the buildings thereon were valued and rated at the time of the passing of the Confirmation Act of 1898.

The plaintiffs claim that the defendants are liable to make good to the plaintiffs the said deficiency in the general rate; but the defendants contend that they are not liable to make good any part of such deficiency, or at any rate that they are only liable to make good such part of such deficiency as arises with respect to that part of the general rate which represents the poor's-rate.

The questions for the opinion of the Court are:—

(1.) Whether under the provisions of the said Acts of Parliament the defendants are bound to make good to the plaintiffs the whole of the deficiency in the general rate.

(2.) If the last question is answered in the negative, whether the defendants are bound to make good to the plaintiffs the deficiency in the proportion of the general rate which represents the poor's-rate.

Ryde (*Danckwerts, K.C.*, with him), for the plaintiffs. The plaintiffs are liable to make good the whole of the deficiency in the general rate. The effect of s. 10 of the London Government Act, 1899, is to make the general rate one entire indivisible rate, which does not merely include the poor-rate, but is identical with it, except as regards the ultimate appropriation of the moneys collected. The case of *Farmer* v. *London and North Western Ry. Co.* (1), which was prior to the London Government Act, is a strong authority for the plaintiffs. There it was held that under s. 133 of the Lands Clauses Consolidation Act, 1845, the promoters were liable to make good the deficiency not merely in the assessment for poor law purposes properly so called but also in the amounts collected for borough rate and county rate, which were charged upon the poor-rate; a fortiori the promoters must now make up the deficiency in the general rate, which is not merely a charge on the poor-rate, but has been, by the Act of 1899, amalgamated with it or substituted for it.

[WRIGHT J. Is there any statutory provision for distinguishing that part of the general rate which is strictly poor-rate from that which is not?]

Sect. 11, sub-s. 3, of the Act of 1899 provides that the demand note shall distinguish the several purposes for which the rate is levied; but that sub-section does not affect the question, for the rate nevertheless remains one rate, the whole general rate being now a poor-rate for the purposes of assessing, making, levying, and collecting the rate. The intention of the Act of 1899 was to create a new rate on the same footing as, and incorporating, the poor-rate.

Avory, K.C. (*Layman* with him), for the defendants. The liability of the defendants must be ascertained as at the date of the provisional order (1898) under which the defendants were authorized to put in force the compulsory powers for purchase and taking of land under the Act of 1845, and at that date they were not liable as promoters to make good any deficiency beyond the deficiency in the poor-rate as understood when s. 133 of the Act of 1845 was passed. The effect of s. 10 of the Act of 1899 was merely to regulate the procedure for levying and collecting rates; it did not affect or alter the nature of the rate. The words "shall be assessed, &c.," in that section merely mean that the same procedure shall be adopted as if it were a poor-rate. Sect. 16 of the Act of 1899 indicates the intention of the Legislature that the scheme under the Act shall preserve existing exemptions and immunities, and it shews no intention to enlarge existing liabilities; the scheme carries out the object of the Act by providing for the preservation of all existing exemptions from rates, and the result is that the liability in respect of making up the deficiency in rates is not enlarged but is specifically limited to charges which are part of the poor-rate properly so called. It is admitted that the defendants must make good the deficiency in the poor-rate properly so called, or in matters payable out of the poor-rate, and that is the extent of the decision in *Farmer* v. *London and North Western Ry. Co.* (1) One of the objects of s. 11, sub-s. 3, of the Act of 1899 was to keep the amount required for the poor-rate separate from the other amounts collected under the title of "general rate," which shews that the several old rates were not by s. 10 consolidated into one rate for all purposes.

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(1) (1888) 20 Q. B. D. 788.

Ryde, in reply.

WRIGHT J. Under s. 133 of the Lands Clauses Consolidation Act, 1845, the promoters of undertakings to whom that Act applies are made liable, not to be rated to the poor-rate, but to make good the deficiency in the poor-rate caused by their taking under their statutory powers lands and buildings assessed to that rate; they are liable also to make good the deficiency in the land tax. The defendants have taken land under circumstances which render that section applicable, and the only question for my decision is what, in relation to the present case, is the meaning to be given to the expression

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(1) 20 Q. B. D. 788.

"poor's-rate" in the section; the answer depends upon s. 10 of the London Government Act, 1899. The Lands Clauses Act itself selected the poor-rate as the rate the deficiency in which had to be made good; it left other rates, such as the county rate, the watching and lighting rate, &c., entirely outside its scope. I do not think that at that time the borough rate was payable out of the poor-rate; certainly in some boroughs it was not so payable down to a very recent period. It is useless, however, to conjecture why the same principle was not applied to all rates; it may have been that the poor-rate was a mere burden upon land, of which it was thought that everybody ought to pay his share, and that the rate ought to be paid even in a case like this where the land might be temporarily unprofitable, because then it would be a burden undertaken with a view to the future profitable user of the land. Again, it may have been thought that there should not be a similar liability in the case of charges which were not strictly a burden upon the land, but were rather charges in respect of the value of something provided by the local authority, such as sewerage, water, or lighting, &c., for in such a case the land might lie idle in the hands of the promoters of the undertaking, and they would receive no benefit from what was provided.

But the real question is the effect of s. 10 of the Act of 1899. Now, sub-s. 2 provides that the general rate and the poor-rate are to be assessed, made, and levied "as one rate," which is to be called the general rate, and is to be assessed, made, collected, and levied as if it were the poor-rate; it does not abolish either the general rate or the poor-rate, but leaves them together side by side; it does not say that all these expenses are to be provided for by a levy which is to be part of the poor-rate: it says "as if it were the poor-rate," which is very different from saying that these expenses are to be treated as part of the outgoings of the poor-rate. It is that difference of expression which prevents *Farmer* v. *London and North Western Ry. Co.* (1) from being an authority in the present case. There it was decided, and properly decided, that everything which was chargeable on the poor-rate was to be regarded as being within a provision of this kind.

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(1) 20 Q. B. D. 788.

Pausing at this point in the section, I do not think there is enough to establish the conclusion that all these purposes are to be treated as purposes of the poor-rate. The section then provides that all enactments applying or referring to the poor-rate are, subject to the provisions of the Act as to audit, to be construed as applying or referring also to the general rate; I think that this carries the matter no further. The words in their natural sense mean that enactments relating to the machinery for assessment, for making, collecting, and levying the poor-rate, and for appeals, are to apply in future to the general rate. The expression "all enactments applying to the poor-rate" is, if taken literally, difficult of application; I do not think that the Lands Clauses Act, 1845, can be properly described as an enactment applying to the poor-rate; it deals, not with the rate, but with the deficiency in the rate owing to the temporary non-rateability of certain premises. Then s. 11, sub-s. 3, of the Act of 1899 indicates that for some purposes the general rate and the poor-rate are intended to be kept separate, for it provides for the separation in the demand note of the several purposes for which the rate is made and for a statement of the approximate amount in the pound required for each purpose, including a proportionate amount of the costs of collection. In the scheme which has been made under this Act there is an express provision for the purpose of giving effect to exemptions. The council is to apportion the amount of the general rate so as to shew approximately the rate from time to time for any of the purposes or the number of purposes in respect of which there is such an exemption, and the rates in the pound so apportioned and entered are to be treated as levied for the purposes in respect of which these sums are given. I am not clear that that does not apply to this very case, although the word "exemption" is not appropriate for this purpose; but it may be that the word is there used in a very general sense and would cover a case like the present. Apart altogether, however, from the scheme, I think that the claim of the plaintiffs is not made out:

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the form of ss. 10 and 11 would be a strange form to adopt if the intention were to impose a novel burden of this kind, especially when it is remembered that s. 133 of the Act of 1845 is not concerned with rating at all; while ss. 10 and 11 are entirely concerned with rating, s. 133 is concerned merely with the making up of the deficiency in the rate. I think that the true meaning of the enactments when read together is that the school board must make up the deficiency of that part of the general rate which represents the poor-rate, or represents anything chargeable on that rate. The first question must therefore be answered in the negative; the second in the affirmative.

Judgment accordingly.

Solicitor for plaintiffs: *A. M. Bramall.*
Solicitor for defendants: *C. E. Mortimer.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Aug. 1, 4, 5, 11.

CORPORATION OF TRURO *v.* ROWE.

Fishery—Oysters—Depositing Oysters on Foreshore for purpose of Storage—Incident of Public Right of Fishing—Municipal Corporation—Power to acquire Lease of Foreshore—Sea Fisheries Act, 1868 (31 *&* 32 *Vict. c.* 45), *s.* 41—*Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 250.

The oysters in an oyster fishery were when freshly dredged unfit for consumption by reason of their being contaminated with impurities in the water, and the defendant, a fisherman, after dredging deposited his oysters in a particular portion of the foreshore indicated by boundary marks and left them there until they were ready for market:—

Held, that the defendant had no right, as incidental to the exercise by him of the public right of fishing, to appropriate a portion of the foreshore for the storage of his oysters to the exclusion of the rest of the public.

Where a municipal corporation, empowered by charter to hold lands, tenements and hereditaments, and goods and chattels, has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, it may lawfully take a lease of the foreshore of the fishery to enable it to carry out the purposes of the order.

APPEAL from a decision of Wills J. on further consideration after trial before a jury, reported [1901] 2 K. B. 870.

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The plaintiffs were an ancient corporation incorporated by Royal Charter, and by a charter of 31 Eliz., confirming earlier charters, power was given to the plaintiffs "to hold, purchase, receive, and possess lands, tenements . . . . and hereditaments of what kind or nature soever they may be to them and their successors in fee and perpetuity, and also goods and chattels and other things of what nature or kind soever they may be."

By an order of the Board of Trade made under the Sea Fisheries Act, 1868, and confirmed by the Oyster and Mussel Fisheries Order Confirmation Act, 1876, the power of regulating the oyster and mussel fishery in a part of the estuary of the Truro river, in the county of Cornwall, was conferred upon the plaintiff corporation. The order did not give the plaintiffs any power to acquire land on lease or otherwise. In June, 1897, the plaintiffs, in order to enable them to carry out more efficiently their powers under the order, obtained from the lord of the manor a lease of the foreshore of the estuary of the Truro river for a term of fourteen years. Owing to the fact that the water in which the oyster beds of the fishery were situate was contaminated by copper from mines in the neighbourhood, the oysters when freshly dredged were unfit for the market, and the fishermen had been used after dredging to lay the oysters for a certain period until they were fit for market upon a portion of the foreshore leased to the plaintiffs. It was the practice of the fishermen by an arrangement among themselves to allocate to each individual a particular spot for the depositing of his oysters, which spot was indicated by stakes or withies fixed in the ground. The defendant, a fisherman, in accordance with the practice, was in the habit of depositing the oysters dredged by him upon a particular portion of the foreshore leased to the plaintiffs. The plaintiffs sued the defendant in trespass. The defendant claimed to be entitled to use the foreshore in the manner complained of both by custom and also by the common law as incident to the public right of fishing. At the trial the jury found that the acts done by the defendant did not constitute an actual occupation of the soil, but were only incidental to the fishing for oysters, and that oyster fishing could not practically be carried on

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without them. The judge reserved for further consideration the questions whether the plaintiffs, being a municipal corporation, had power to take a lease of the foreshore, and had consequently any such title as would enable them to maintain an action of trespass, and whether the right of depositing the oysters on the foreshore could legally exist as an incident of the right of fishing for oysters. Upon further consideration the learned judge held, first, that the plaintiffs, having obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, might by virtue of s. 41 of that Act lawfully take a lease of the foreshore of the fishery if the acquisition of the leasehold would enable it the better to carry out the purposes of the order; but, secondly, that the acts of the defendant could be justified, both by custom and at common law, as being incidental to the enjoyment of the public right of oyster fishing; he therefore gave judgment for the defendant. The plaintiffs appealed.

Duke, K.C., and *R. J. Parker* (*J. A. Hawke* with them), for the plaintiffs. The plaintiffs are entitled to judgment. Notwithstanding the verdict of the jury, the defendant's acts necessarily involved the occupation of parts of the foreshore for the purpose of the storage of oysters. The deposit of the oysters in a defined part of the foreshore was not merely an act incidental to a public right of fishing for oysters; it was in the nature of an occupation of the soil, and amounted to a claim of a right to use a portion of the foreshore as an oyster bed, as though the defendant were the owner of a several fishery. This was substantially what the defendant in his evidence said it meant; in any other point of view it would be a mere idle practice on the part of the defendant and the other fishermen. If such a right could be established, it would equally be possible to establish a right to cure herrings or dry fish on the foreshore. The view of the jury when they found that there was no occupation of the foreshore by the defendant was that the oysters were not deposited there for the purpose of storage, but were put back on the fishery for any one who

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liked to take them: there is no evidence to support any such view. It is clear that the right claimed was to put down the oysters on the foreshore and to reclaim them when necessary; in other words, a right of storage till the oysters could be brought to market and sold to advantage. There could be no better foundation for such a right than for a claim of a right to keep a bathing machine on the foreshore, and there was no evidence given of any local custom. A right to store fish on the foreshore, if proved, would be evidence of a right to the soil itself; for there would then be a several fishery, and proof of the ownership of a several fishery over a part of the foreshore raises a presumption that the freehold of the soil of that part of the foreshore is in the owner of the several fishery: *Attorney-General* v. *Emerson.* (1)

[They also cited Brooke's Abridgement, tit. "Customs," 46; *Blundell* v. *Catterall* (2); *Gray* v. *Bond* (3); *Edwards* v. *Jenkins.* (4)]

Foote, K.C., and *Bodilly*, for the defendant. The right claimed by the defendant and found by the jury in his favour is a right to deposit oysters on the foreshore as a necessary incident of a public right of fishing. The mere laying of oysters on the shore does not amount to an occupation of the land on which they are placed: *Mayor of Colchester* v. *Brooke.* (5) The depositing of oysters is a necessary incident of a right of fishing for oysters, and this is recognised by s. 41 of the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45). Unless the ownership and management of oyster beds is an incident of a several fishery and of a right to fish, the decision in *Mayor of Colchester* v. *Brooke* (5) cannot be supported. A common law right of fishing in all the subjects of the Crown stands on the same footing as a several fishery in an individual; and as the owner of a several fishery has the right of user of the foreshore, every person has a right to its use in the exercise of his common law or public right of fishing. In the case of *Attorney-General* v. *Emerson* (1) there was a substantial structure, consisting of a palisade and nets, built upon the foreshore for the purpose of catching ordinary fish; there is nothing of the kind here. An immemorial user of the foreshore by owners of fishing boats, by fixing permanent moorings in the soil for the purpose of attaching their boats to them, may be supported as an ordinary incident of navigation: *Attorney-General* v. *Wright* (1); equally the right here claimed may be supported as an ordinary incident of the right of fishing. The Court will be astute to find a legal origin for the usage: *Goodman* v. *Mayor of Saltash.* (2)

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(1) [1891] A. C. 649.
(2) (1821) 5 B. & A. 268; 24 R. R. 353.
(3) (1821) 2 B. & B. 667; 23 R. R. 530.
(4) [1896] 1 Ch. 308.
(5) (1845) 7 Q. B. 339.

Secondly, the plaintiffs had no power to hold a lease of the foreshore, and therefore had no power to take possession under it. The charters, which entitle the plaintiffs to hold land and chattels, only empower them to hold land in fee, not to pay rent; the expression "goods and chattels" does not include a chattel interest in land. Nor can the plaintiffs rely upon any statutory power. The Sea Fisheries Act, 1868, deals with two classes of fishery orders—those which confer a several fishery, and those which merely confer a right of regulation of a public fishery; it is only under the former class of order that the grantees are empowered to acquire a title in the soil of the foreshore, while the order in the present case is one of the latter class, the effect of which is overridden by getting a lease from the lord of the manor. Nor have the plaintiffs power to hold this lease under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). Sect. 105 only gives a corporation power to purchase and hold a limited quantity of land for specified purposes, of which this is not one. Even assuming that s. 107, which gives power to acquire land with the approval of the Treasury (now the Local Government Board), would include leaseholds, the approval of the Local Government Board was never asked for.

[They also cited Stuart Moore on Foreshore, pp. 717, 718, 849, 850; *Gann* v. *Free Fishers of Whitstable.* (3)]

Duke, K.C., in reply. The defendant's contention that a person exercising a public right of fishing has the same right of user of the foreshore as the owner of a several fishery is a fallacy, and confounds the incidents of a right of several fishery with the incidents of a public right of fishing; if the contention is right, *Lord Advocate* v. *Lord Blantyre* (1), *Lord Advocate* v. *Young* (2), and *Attorney-General* v. *Emerson* (3) were wrongly decided. The case of *Mayor of Colchester* v. *Brooke* (4) is a conclusive authority to shew that a common law right of taking fish does not carry the incidents relied on by the defendant. The test of a claim of this nature is to see whether it can be exercised by the public generally, and no authority has been cited which supports any such proposition. The findings of the jury are contrary to the admitted facts of the case, which are all one way.

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(1) [1897] 2 Q. B. 318.

(2) (1882) 7 App. Cas. 633.

(3) (1865) 11 H. L. C. 192.

There is no defect in the plaintiffs' title; it was not ultra vires for them to take this lease.

[He was stopped on this point.]

Cur. adv. vult.

Aug. 11. The judgment of the Court (Collins M.R., Stirling L.J., and Cozens-Hardy L.J.) was read by

Cozens-Hardy L.J. The title of the lord of the manor to the foreshore of the estuary of the Truro river (in which term "foreshore" we include for convenience not only the foreshore proper but also the fundus) is not in dispute. The plaintiffs have taken a lease of the foreshore from the lord of the manor, and Wills J. has upheld the title of the plaintiffs under this lease. We think this decision was correct. It may be justified by reference to the ancient charters of the corporation, the rights under which are expressly saved by s. 250 of the Municipal Corporations Act, 1882.

It is not, and cannot be, disputed that the defendant, as a member of the public, has rights of fishing over the foreshore covered with water. The facts are admitted. The defendant dredges oysters in deep water and deposits them in a particular section of the foreshore indicated by sufficient boundary marks, partly for cleansing, partly for fattening, and partly to be ready

(1) (1879) 4 App. Cas. 770.
(2) (1887) 12 App. Cas. 544.
(3) [1891] A. C. 649.
(4) 7 Q. B. 339.

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for distant markets. By his defence the defendant claims this as a right, (1.) by virtue of a several fishery, (2.) by virtue of a local custom, and (3.) by virtue of his possession of the ground. By his evidence in the witness-box he treated the ground as his ground, and the oysters as his oysters. If it is important to consider quo animo certain acts are done, the statements of the doer are surely the most material, if not the only material, elements. Here the evidence is all one way. But the judge was asked to accept, and apparently accepted, the statements of the defendant's counsel in preference to the uncontradicted evidence. And we have been urged to hold that the defendant only deposits the oysters on the foreshore as an incident of fishing, and that, in short, he is only putting the oysters into the water where any one may get them. We cannot adopt this view. It makes the action a mere farce. It seems to us plain that the parties intended to try, and did try, the important question whether the defendant has a right to appropriate a section of the foreshore for his own purposes, for storing his own oysters, to the exclusion of the rest of the public. In our opinion such a claim cannot be supported as a common law right. No authority has been produced in favour of it. Unless interrupted, the defendant might acquire a title against the plaintiffs.

The findings of the jury were, (1.) that the acts done did not constitute an actual occupation of the soil, but were only incidental to the fishing for oysters; (2.) that oyster fishing could not practically be carried on without what has been called storage; and judgment was entered for the defendant with costs. These findings can only be supported on the assumption that all the contentions raised in paragraphs 8, 9, and 10 of the defence (1) were either abandoned by, or decided against, the defendant, and that the defendant relied solely upon his rights as a member of the public, and in particular that he did not claim any property in the oysters deposited in

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(1) In paragraph 8 the defendant claimed a right of several fishery in gross; in paragraph 9 a right by virtue of a custom in the inhabitants to enter upon the foreshore for the purpose of storing and dealing with oysters; and in paragraph 10 he claimed to be in possession of the premises in question.

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his section of the foreshore. The plaintiffs in their statement of claim, on the other hand, have raised contentions which they did not attempt to justify. Under these circumstances, it does not seem right that judgment should be entered simpliciter either for the plaintiffs or for the defendant. The proper course will be to vary the judgment by making such a declaration as is needed to settle the real questions raised between the parties in this action.

Declare that the defendant in common with the rest of His Majesty's subjects is entitled to enter on the hereditaments demised by the indenture of lease in the statement of claim mentioned and on every part thereof for the purpose of fishing for and taking and carrying away oysters and other shell-fish, and also for the purpose of depositing oysters and other shell-fish thereon, but is not entitled to the exclusive occupation of any part of the said hereditaments, and is not entitled to any such oysters or other shell-fish so long as the same shall continue so deposited.

Having regard to the unfounded claims made by both parties, there should be no costs either in the Court below or of this appeal. But the costs which the plaintiffs have paid to the defendant must be returned.

Judgment accordingly.

Solicitor for plaintiffs: *J. A. Bartrum, for R. Dobell, Truro.*

Solicitor for defendant: *S. James, for J. Messer Bennetts, Truro.*

W. J. B.

COUNCIL OF THE CITY OF WESTMINSTER *v.* WATSON.

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May 15.

London Government—Transfer of Powers to Borough Councils—District Surveyors—London Building Act, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 84—*London Government Act,* 1899 (62 *&* 63 *Vict. c.* 14), *s.* 5; *Sched. II., Part I.*

The transfer by the London Government Act, 1899, of the powers and duties of the London County Council as to licensing the erection of wooden structures under s. 84 of the London Building Act, 1894, to the borough councils established by the Act of 1899 does not operate as a transfer of the powers and duties of the district surveyors with respect to the supervision or inspection of those structures. Under the licence granted by a borough council a district surveyor has no powers, duties, or liabilities imposed upon him, unless he is named in the licence as the person to exercise supervision or inspection.

Wooden structures falling within s. 84 of the London Building Act, 1894, are works of which a district surveyor is entitled to notice under s. 145 of that Act, and as to which he may have duties of supervision and inspection independently of the terms of the licence of the borough council.

The right to receive the fees for supervision and inspection specified in the London Building Act, 1894, has not been transferred to the borough councils, nor has it wholly lapsed; a right to receive proper fees for duties necessarily performed remains in the district surveyor.

Special Case stated under s. 29 of the London Government Act, 1899.

By s. 1 of the London Government Act, 1899, it was enacted that the whole of the administrative county of London, exclusive of the City of London, should be divided into metropolitan boroughs; and by that section it was also declared lawful for Her late Majesty by Order in Council, subject to and in accordance with the Act, to form each of the areas mentioned in the 1st schedule to the Act into a separate borough . . . . and to establish and incorporate a council for each of the boroughs so formed.

By Sched. I. of the Act it was declared that one of the areas to be constituted a separate borough was "the area of the ancient parliamentary borough of Westminster."

By the Borough of Westminster Order in Council, 1900, dated May 15, 1900, and made under and in pursuance of the provisions of the London Government Act, 1899, there was constituted a metropolitan borough of Westminster, and a council was established for that borough.

By Royal Charter, dated October 29, 1900, there was granted and confirmed to the said metropolitan borough of Westminster the title of city, and it was declared that from the date therein mentioned the said borough should be called and styled the city of Westminster, and that the council established for the said borough should be styled the mayor, aldermen, and councillors of the city of Westminster.

By s. 5, sub-s. 1, of the London Government Act, 1899, it is enacted that "as from the appointed day the powers and duties of the London County Council under the enactments mentioned in Part I. of the 2nd schedule to this Act shall, subject to the conditions mentioned in that schedule, be transferred to each borough council as respects their borough." November 9, 1900, was appointed as the day for the coming into force of this section by an order of the Lord President of the Privy Council dated October 18, 1900, and made under the powers of s. 33 of the London Government Act, 1899.

Sched. II., Part I., of the said Act, so far as directly material, runs as follows:—

"Part I. Minor Powers and Duties to be transferred from County Council.

Powers and Duties transferred.	Conditions of Transfer.
"Power under s. 84 of the London Building Act, 1894, to license the setting up of wooden structures, and power to take proceedings for default in obtaining or observing the conditions of a licence under that section."	

Sect. 84 of the London Building Act, 1894, is one of a group of five sections included in Part VII. of that Act under the title, "Special and temporary buildings and wooden structures," and is in the following terms:—

Sect. 84: "(1.) No person shall set up in any place any wooden structure (unless it be exempt from the operation of this part of this Act) except hoardings enclosing vacant land and not exceeding in any part twelve feet in height without having first obtained for that purpose a licence from the council; and the licence may contain such conditions with respect to the structure and the time for which it is to be permitted to continue in the said place as the council think expedient.

"(2.) Provided that such a licence shall not be required in the case of any wooden structure of a movable or temporary character erected by a builder for his use during the construction, alteration, or repair of any building unless the same is not taken down or removed immediately after such construction, alteration, or repair: Provided that this section shall not extend to or apply within the City"—i.e., the City of London—"or to any hoarding duly licensed by the local authority under any statutory powers in that behalf."

In order to enable spectators to view the funeral procession of Her late Majesty Queen Victoria on February 2, 1901, and the procession of his present Majesty King Edward VII. to open Parliament in State on February 14, 1901, a large number of stands or structures were erected within the city of Westminster along the line of route of the procession. These stands or structures were constructed of wood, except the nails and some of the fastenings and the cloth or other hangings placed upon them.

Questions arose between the Westminster City Council and the London County Council as to whether the city council or the county council was the proper authority (1.) to license the erection within the city of Westminster of the structures previously referred to, (2.) to take proceedings against persons who without licence, permission, or approval erected such structures, and (3.) whether such structures were or were not subject to the supervision or inspection of the district surveyors under the London Building Act, 1894. These questions were submitted for the opinion of the King's Bench Division under s. 29 of the London Government Act, 1899, and the Court

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determined (1) that the structures fell within s. 84 of the London Building Act, 1894, and that the Westminster City Council were the proper authority to grant licences for their erection and to take proceedings for the erection of such structures without licence. The Court declined in the absence of any representative of the district surveyors to answer the third question.

The functions of the district surveyors are in the main regulated by Part XIII. of the London Building Act, 1894. The district surveyors are appointed by the London County Council from persons having the professional qualifications specified in ss. 139 and 140. The county council has power to dismiss or suspend the district surveyors and to alter their districts (s. 139). They are ordinarily paid by fees specified in the schedule to the Act or fixed by the London County Council under the Act subject to alterations not material to this case, and subject to a power to pay salaries in lieu of fees.

[The case then set out ss. 138–158 and ss. 160–163 of the London Building Act, 1894; it is sufficient here to set out the following.]

Sect. 138: "Subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure and every work done to, in, or upon any building or structure, and all matters relating to the width and direction of streets, the general line of buildings in streets, the provision of open spaces about buildings, and the height of buildings shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate."

Sect. 145: "In the following cases and at the following times (that is to say) (A) where a building or structure or work is about to be begun then two clear days before it is begun, and (B) where a building or structure or work is after the commencement thereof suspended for any period exceeding three months then two clear days before it is resumed, and (C) where during the progress of a building or structure or work the builder employed thereon is changed then two clear days before a new builder enters upon the continuance thereof, the builder

(1) *Westminster Corporation* v. *London County Council*, [1902] 1 K. B. 326.

or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. Every building notice shall state the situation, area, height, number of storeys, and intended use of the building or structure, and the number of buildings or structures if more than one, and the particulars of the proposed work, and the name and address of the person giving the notice and those of the owner then in possession of and the occupier of the building or structure or of its site or intended site. All works in progress at the same time to, in, or on the same building or structure may be included in one building notice."

Sect. 154: "(1.) There shall be paid by the builder, or in his default by the owner or occupier, as the case may be, of the building or structure in respect whereof the same are chargeable, to every district surveyor in respect of the several matters mentioned in Parts I. and III. of the 3rd schedule to this Act the fees therein specified, or such other fees not exceeding the amounts therein specified as may be directed by the council.

"(2.) If in consequence of any reduction being made by the council in the amount of the said fees the income of any existing district surveyor is diminished, the council shall grant to him compensation in respect of such diminution."

"Third Schedule. Fees Payable to District Surveyors.

"Part I. On wooden and temporary structures.

"On inspection of any wooden structure or on inspection of any structure or erection put up on any public occasion, the same amount as for a new building calculated on the area of the structure or erection without reference to the area of any building to which it may be attached or in or on which it may be put up."

Part VII. of the London Building Act, 1894, which includes s. 84, contains no express reference to district surveyors except in s. 82, sub-s. 5, which requires a copy of the plans and particulars approved by the council in the case of any iron building or structure, or any other building or structure to which the general provisions of Part VI. of the Act are inapplicable, to be furnished to the district surveyor. Prior to the transfer to the metropolitan boroughs of the administration of s. 84 it was the practice of the London County Council to make any grant of licence or approval under Part VII. conditional on the work being done to the satisfaction of the district surveyor.

The regulations and licence now used by the city of Westminster for structures falling within s. 84 do not contain any conditions that the structure licensed should be subject to the inspection or supervision of the district surveyor, or should be erected to his satisfaction.

Part IX. of the Act makes provisions as to dangerous and neglected structures. The district surveyors have a duty to report to the London County Council information received by them that any structure is in a dangerous state, and may be required by the London County Council to survey such structure. Fees are provided for surveyors for surveys and subsequent action as to dangerous structures, but no fee is provided merely for reporting information, and the provision as to the fees in question is made by s. 113 of the Act coupled with Part II. of the 3rd schedule.

The questions which have arisen between the Westminster City Council and the district surveyors who are parties to this case are: (1.) as to whether the powers, duties, and liabilities of the surveyors with respect to the supervision or inspection of wooden structures falling within s. 84 have been transferred to the city council and its officers; (2.) as to whether wooden structures falling within s. 84 are works of which the district surveyor should have a notice under s. 145 of the Act, and as to which he has duties of inspection and supervision independently of the terms of any licence; (3.) as to whether the right to receive the fees for such supervision and inspection has been transferred to the Westminster City Council and its officers, or has lapsed, or is still retained by the district surveyors independently of the terms of the licence granted.

It is contended for the Westminster City Council—(1.) that the district surveyors are officers of the London County

Council; (2.) that on the transfer to the city council of the powers, duties, and liabilities of the London County Council as to the wooden structures of the character specified in the case and falling within s. 84 of the London Building Act, 1894, all duties, powers, and liabilities of the district surveyors as officers of the London County Council or otherwise with reference to the supervision and inspection of such structures passed to the Westminster City Council and its officers; (3.) that the right to receive the fee specified in the case is (*a*) contingent on the actual designation of the district surveyor in the licence as the person to survey and inspect the licensed erection, or (*b*) transferred from the district surveyors to the Westminster City Council and its officers, so far as the fee is payable for the supervision and inspection of wooden structures erected under the licence of the Westminster City Council granted under s. 84 of the London Building Act, 1894; (4.) that the functions of the district surveyor with respect to wooden structures under s. 84 are now limited to such functions as he may have under Part IX. of the Act with respect to dangerous or neglected structures, and that the fees recoverable by him with respect to such wooden structures are limited to cases falling within Part IX. (dangerous structures); (5.) that even if the Court should decide that it is still the duty of the district surveyors to inspect and supervise the erection of wooden structures licensed by the Westminster City Council to see that they comply with the conditions of the licence, and even if it is still the right of the district surveyors to receive the fees specified in the first part of Sched. III. of the London Building Act, 1894, it is the duty of the district surveyors to make a report or return under ss. 160–63 of the London Building Act, 1894, to the Westminster City Council of the existence of any wooden structures within the city which the district surveyors discover to have been erected in the city without the licence of the Westminster City Council, or contrary to the regulations and conditions on which the Westminster City Council has granted a licence for their erection, and to make a return to the Westminster City Council of the fees received by the district surveyors in respect of wooden structures licensed by the Westminster City Council.

It is contended for the district surveyors—(1.) that under s. 5, sub-s. 1, of the London Government Act, 1899, the powers and duties of the London County Council alone are transferred; (2.) that the district surveyors are not officers of the London County Council, but though now appointed by, and to some extent responsible to, that council they exercise powers and perform duties under express statutory provisions and do not derive their authority from that council; (3.) that their powers and duties in respect of structures to which s. 84 of the London Building Act applies arise under other sections of that Act and do not in any way depend on the licence which may be granted under that section; (4.) that their powers and duties in respect of such structures are not limited to such as arise under Part IX. of the Act; and (5.) that they are entitled in respect of the exercise of their powers and duties as to structures within s. 84 to the fees prescribed by Sched. III. of the London Building Act.

Manisty, K.C. (*Craies* and *B. O. Bircham* with him), for the Westminster City Council. The licence issued by the Westminster Council under s. 84 may contain such conditions as the council think fit to impose; it was the practice of the county council to insert a condition that the structure must be erected to the satisfaction of the district surveyor, and since the transfer the Westminster licence contains a condition that it must be erected to the satisfaction of the city engineer and surveyor. Sects. 138 and 145 must be read together in order to see what structures are referred to in the latter section, and it is apparent that they refer to a structure or work in the nature of a building, and not to mere temporary structures: *Venner* v. *McDonell*. (1) And further, s. 138 only gives to the district surveyor the supervision of a structure in the nature of a building "subject to the provisions of this Act"; if, therefore, in the licence granted by the Westminster Council the name of the city engineer and surveyor is inserted, it is his

(1) [1897] 1 Q. B. 421.

duty, and not that of the district surveyor, to exercise the supervision. Further, no building notice is required to be given to the district surveyor under s. 145, for this structure is not in the nature of a building, neither is it a "work" in connection with a building or structure within that section. If the district surveyor has jurisdiction, his report should be made to the Westminster City Council, and not to the London County Council.

Macmorran, K.C. (*Ryde* and *Hilliard* with him), for the district surveyor. Sect. 84 applies to all wooden structures, temporary or permanent. The only thing transferred under the London Government Act is the power of licensing—that is, of forbidding, if necessary, the erection of wooden structures. If the contention of the Westminster City Council is right, and the district surveyors have no longer the duty of supervising these structures, the power to supervise would depend entirely on the conditions inserted in the licence, and if no condition as to supervision were inserted there could be no power in any one to supervise the erection of these structures. The duties and powers of the district surveyors over structures to which s. 84 of the London Building Act applies arise under s. 138 and following sections of that Act, and do not in any way depend upon the conditions of the licence granted under s. 84, and these statutory duties and powers, which are wholly independent of the licence, are not transferred to the Westminster City Council by reason of the power to license having been transferred to them. The London Government Act, 1899, merely transferred certain powers and duties of the London County Council; the district surveyors are not servants of that council, and neither their statutory duties nor their statutory right to receive fees can be transferred by a transfer of the duties of the county council; if the Legislature had intended to transfer the rights and duties of the district surveyors it would have done so in plain language.

Manisty, K.C., in reply.

LORD ALVERSTONE C.J. This case raises a question of some difficulty. The necessities of modern legislation, or the conditions under which legislation takes place, have rendered it necessary that there should be legislation by reference, and one of the difficulties unavoidably imposed on the Courts is that they have frequently to construe Acts of Parliament which incorporate sections of other Acts by mere reference: that is the difficulty with which we are confronted in the present case.

The 2nd schedule of the London Government Act, 1899, transferred from the county council under the words "minor powers and duties to be transferred" the power under s. 84 of the London Building Act, 1894, to license the setting up of wooden structures, and the power to take proceedings for default in obtaining or observing the conditions of a licence under that section. It is plain that s. 84 contemplated that the licence might contain conditions with reference to the structure and the time for which it was to be permitted to continue. That the city of Westminster and the metropolitan boroughs get something under the transfer is not denied; we decided in *Westminster Corporation* v. *London County Council* (1) that the right of licensing, or imposing conditions in the licence and of taking proceedings in respect of not obtaining a licence or of not observing the conditions, had been transferred to the city council. There were in existence at the date of that transfer a number of provisions respecting the duties of district surveyors—provisions which imposed on them duties partly defined by the Act of Parliament, and partly resting on by-laws which might be made under the Act of Parliament. They were duties imposed upon persons not strictly servants of the county council, but to a certain extent under their jurisdiction, for their deputies can only be appointed subject to the approval of the county council; the district surveyors are officers under the London Building Act with important duties to discharge. In my opinion, it was not intended to transfer to the officers of the new corporations the duties of the district surveyors; far stronger language would have been necessary to effect such a transfer. But it might be that the transfer of the powers of the county council would by its operation destroy some of those duties, and it is quite possible

(1) [1902] 1 K. B. 326.

that by this kind of legislation the duties of the surveyors might be to a certain extent taken away. We have therefore to consider what is the true view of the law, having regard to the respective positions of the county council and of the surveyors, and to what was intended by the statute to be transferred. I repeat that the city council can specify the conditions of the licence—they can insert in it any safeguard which they think proper for their own protection or for the protection of the public within their municipality; and if any duties are imposed upon anybody by the licence, they are not imposed upon the district surveyors as such. At the same time, I also think that the transfer of the duties of the county council to the city council does not destroy any of the rights or duties of the district surveyor, except so far as the actual necessity of the transfer involves what I may call the alteration or destruction of those duties.

In the light of these general observations, which I have endeavoured to state as clearly as I could, I have to consider the three questions that are put to us in paragraph 19 of this case. The first is "whether the powers, duties, and liabilities of the surveyors with respect to the supervision and inspection of wooden structures falling within s. 84 have been transferred to the city council and its officers." In so far as those duties depend upon the terms of the licence, it is not a question of transfer at all; it is a question of duties which are imposed upon the officers of the city council, if there are any such named by the terms of the licence. They are not duties which are taken away from the district surveyors; and therefore it follows that the district surveyors do not have either the right or power or duty of performing any of the duties prescribed by the licence, unless the licence by its terms indicates that they are the persons to fulfil those duties; for instance, it might be quite possible for the city council in certain cases to say that they would direct these structures to be erected subject to the supervision of the district surveyor. My answer to the first question is that the powers and duties of the district surveyors are not transferred to the city council and its officers, and that the district surveyors have no powers, or duties, or liabilities under the licence which is granted by the city of Westminster.

The second question is whether wooden structures falling within s. 84 are works of which the district surveyor should have a notice under s. 145 of the Act, and as to which he has duties of inspection and supervision independently of the terms of any licence. I think on the whole, but not without considerable doubt, that the district surveyors are entitled to have notice under s. 145—of course, not notice of all the things that are specified in s. 145, because they are not applicable, but there may be questions, notably the question of dangerous structures, possibly also questions of interference with streets or street lines, which may impose upon the district surveyor in a proper case the right of inspection under the terms of the London Building Act, and, of course, in no way based upon the licence. I must not be understood as meaning to suggest that, because notice is given, the surveyor has the right of going in and purporting to exercise functions under the Building Act which have no relation to the structure which is actually being erected, or to the character of the structure; nor must I be thought to express an opinion that where simply a notice is given the surveyor could properly say, "I will go in and inspect and will claim my fee," although there was no reasonable ground for suggesting that there was any danger or any infraction of any conditions in the statute. But I think it is impossible for us to say, having regard to the duties which may in some cases be imposed or arise under the London Building Act to be performed by the surveyor, that he is not entitled to notice.

The last question is as to whether the right to receive the fees for supervision and inspection specified in paragraph 15 of the case has been transferred to the city council and its officers, or has lapsed, or is still retained by the district surveyor. I am of opinion that the right has not been transferred to the applicants or their officers: this follows from the earlier part of my judgment. I do not think it can be said to have altogether lapsed. The reasonable and proper course for the county council to take would be to exercise their powers which they have under s. 154 of the Act of 1894, of allowing a lesser fee where the duties to be performed by the district surveyor would obviously be very much less than those he would have to perform under the circumstances contemplated by the statute. I am of opinion that the right to proper fees is not taken away, and that if in a proper case for good cause a surveyor, on information he has received, has the duty cast on him to inspect, or if some question arises which may properly give him the right to inspect in order to see whether the provisions of the Act have been infringed, then he would be entitled to a fee. I can do no more than indicate my opinion as to what ought to be done with regard to the amount of fees; but I wish it to be understood that I do not, in recognising this right of district surveyors, suggest that they are entitled, simply because they are district surveyors and have certain duties to perform under the Act, to claim fees in respect of every building which may be erected. The case is, no doubt, one of difficulty in consequence of the transfer of the duties from the county council without any special reference to the duties of district surveyors. I have answered the questions, and I trust my answers will be sufficient to enable persons to ascertain what their rights are.

DARLING J. I am of the same opinion. With regard to the district surveyor inspecting one of these temporary wooden buildings and obtaining a fee for doing so even after notice, during the argument it taxed the ingenuity of counsel to suggest even a hypothetical case in which one of these erections could infringe the provisions of the Act of 1894, and so really require the attention of the district surveyor. That is enough to satisfy me that there will be really no unnecessary interference by district surveyors with buildings such as these.

CHANNELL J. I do not think it is correct to say that any powers, duties, or liabilities of the surveyors have been transferred by the London Government Act, 1899, because the district surveyors are persons having a statutory position and duty cast upon them; they are not mere servants of the

London County Council. The result seems to be that the transfer of the powers and duties of the London County Council cannot possibly operate as a transfer of the powers and duties of the district surveyors. But incidentally the transfer to the city of Westminster of powers which, but for that transfer, would have been exercised by the London County Council, has, in my opinion, very substantially diminished the duties of the district surveyors. Under the former proceedings, when the duty of licensing was in the London County Council, it was undoubtedly the practice, as is shewn by the form of the licence, so to frame the licence that the district surveyor would be the person who would have the very substantial work to perform of seeing whether or not the structure was erected in accordance with the licence. But the effect of taking away that licensing power and giving it to another body, which is in fact now exercising it in a way which is only natural—namely, by appointing its own officer to do the work—is to substantially diminish the work of the district surveyor. The duty cannot be said to be transferred because, so far as it is an independent statutory duty, it necessarily still exists. It seems to me, therefore, that the way to answer these questions is as follows. As to the first, that nothing has been transferred, but that so far as any duties would formerly have been imposed upon the district surveyors by the fact that such buildings were licensed by the London County Council, no such duties are now imposed upon them, but are imposed by the licence upon the city surveyors. It is impossible to answer the question in accordance with its exact terms, because nothing has been transferred. With regard to other duties imposed upon the district surveyor, especially the duties with regard to dangerous structures, they remain as they were. As to the second question, in my opinion the district surveyors are entitled to have notice of the works mentioned in the question. It would be sufficient notice to say, "Two days hence I am going to erect a building, a temporary structure, which the city of Westminster has licensed, and which it has directed me to build according to the satisfaction of their own surveyor." That notice would at once tell him that he has very little to do in connection with that structure, but that he may have duties of inspection and supervision independently of the terms of the licence. I think that the matter is quite clear. The structures may be dangerous, and if they are the district surveyor has a definite duty in respect of them. As to the right to recover fees, if in any case he inspects property—and not when he knows that there is nothing for him to inspect, and inspects merely for the purpose of obtaining a fee—he is entitled to his fee. I agree with the suggestion made by my Lord, that the proper way for the London County Council to meet this case is, inasmuch as incidentally the operation of transferring the licensing of these matters from them to the city of Westminster and the other metropolitan boroughs is very greatly to diminish the duties which in point of fact will be likely to fall upon the district surveyor, to make a direction under s. 154, which says that the district surveyor is to have the fees specified in the schedule, or such other fees, not exceeding the amounts therein specified, as may be directed by the council. If the London County Council would make a direction imposing a smaller fee to the district surveyor in cases where the structure was in fact licensed by the city or other authority and not by themselves (which would undoubtedly greatly diminish his work), the whole difficulty, it seems to me, would be met.

Judgment accordingly.

Solicitors for Westminster City Council: *Caprons, Hitchins, Brabant & Hitchins.*

Solicitors for district surveyors: *Hicklin, Washington & Pasmore.*

W. J. B.

C. A.

1902
Nov. 4.

[IN THE COURT OF APPEAL.]

READ *v.* THE FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND AND WALES AND OTHERS.

Action, Cause of—Inducing Employer to break Contract—Justification for Interference—Prior Contract inconsistent with that of Employer.

The plaintiff, who was a workman, entered into a contract by which he was apprenticed to his employers to learn certain work. A friendly society of workmen engaged in similar work protested to the employers against the engagement of the plaintiff as an apprentice, on the ground that it was a breach of one of the rules of the society which the employers had agreed to and signed, and they gave notice that, if the engagement was continued, they would call out the workmen who were working for the employers, and who were all members of the society. In consequence of this threat the employers refused to continue to teach the plaintiff under the terms of the deed of apprenticeship. In an action by him against the society and certain of the officers:—

Held, that the plaintiff had a good cause of action, to which the previous agreement between the society and the employers was no answer.

Order of the Divisional Court, ante, p. 88, varied.

Appeal from the judgment of a Divisional Court, reported ante, p. 88.

The action was brought against the defendants for wrongfully and maliciously inducing the firm of Messrs. Wigg & Wright to break their contract of apprenticeship with the plaintiff, and for maliciously conspiring to procure the contract to be broken. It appeared that the plaintiff, who was twenty-five years of age, was a workman in the employment of Messrs. Wigg & Wright, and became apprenticed to them as a stonemason, and they covenanted to instruct him in the business of stone and marble masons. The defendants were a friendly society of stonemasons and certain officers of the society, and the rules of the society had been agreed to and signed by Messrs. Wigg & Wright. The society protested that the employment of the plaintiff as an apprentice was an infringement of one of the rules, and gave notice that if it was con-

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tinued they would call out the workmen in Messrs. Wigg & Wright's employment, all of whom were members of the society. Messrs. Wigg & Wright in consequence of this threat dismissed the plaintiff, and declined to perform their contract to teach him the trade of a stonemason.

This action was brought in the county court, and judgment was given for the defendants. On appeal the Divisional Court set aside the judgment for the defendants, and by a majority ordered a new trial. (1)

The defendants appealed, and there was a cross-appeal by the plaintiff asking that judgment should be entered for him.

Aug. 6. *Cohen, K.C.*, and *Chester Jones*, for the defendants. The defendants were entitled to take steps to prevent a breach of the contract that Messrs. Wigg & Wright had made with them by agreeing to and signing the rules. It may be that, as an indirect consequence, damage has arisen to the plaintiff because the two contracts are inconsistent; but that does not give the plaintiff a cause of action against the defendants. There was no combination to do an unlawful act or to use unlawful means to enforce their rights, such as intimidation, picketing, or threats. It may be that the contract made by Wigg & Wright with the society was not one that could be enforced by the defendants; and if so, all they could do was to say that if the contract was broken the members of the society would not work for the firm. They did not ask Wigg & Wright to break their contract with Read, but only asked them to perform their contract with the society. It is open to the plaintiff to sue his employers for breach of their contract with him, but he has no cause of action against the defendants arising out of the course taken by the employers. The decisions in *Temperton* v. *Russell* (2) and *Quinn* v. *Leathem* (3) are not in point, because there was in this case no agreement or combination to do an unlawful act.

[They referred to *Reg.* v. *Rowlands* (4); *Mogul Steamship*

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(1) Ante, p. 88, where the facts are set out at greater length.

(2) [1893] 1 Q. B. 715.

(3) [1901] A. C. 495.

(4) (1851) 17 Q. B. 671.

Co. v. *McGregor, Gow & Co.* (1); *Lyons & Sons* v. *Wilkins* (2); *Allen* v. *Flood.* (3)]

F. Low, K.C., and *Henlé*, for the plaintiff. It is irrelevant to say that the plaintiff could sue his employers; the question is whether he has a cause of action against the defendants. The principle by which his claim to sue is established was laid down by Lord Macnaghten in *Quinn* v. *Leathem* (4) thus: "A violation of legal right committed knowingly is a cause of action," and "it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." The facts of this case satisfy those requirements. The breach of covenant was brought about by the threat of a strike, and it lies on the defendants to shew justification for the interference which causes the breach. Lord Watson in *Allen* v. *Flood* (5) pointed out that "in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed." In this case the question is not of a superior right or of an act done in pursuance of some duty, and it was not a case of giving advice. There is nothing in the rule of the society which forbids the teaching of an adult, and that disposes of any legal ground of interference.

[They referred to *Lumley* v. *Gye* (6), *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (7), and *Bradford* (*Mayor of*) v. *Pickles.* (8)]

Cohen, K.C., in reply, referred to *Gregory* v. *Brunswick* (*Duke of*) (9) and *Wolfe* v. *Matthews.* (10)

Cur. adv. vult.

Nov. 4. COLLINS M.R. read the following judgment:—This is an appeal by the defendants from the decision of the Divisional Court ordering a new trial of a case decided by a county court judge in favour of the defendants. There is a cross-appeal by the plaintiff asking that this Court should give judgment for the plaintiff with damages. The Court below, while agreed that the decision was unsatisfactory, were divided as to the relief, Darling J. and Channell J. holding that there ought to be a new trial, while Lord Alverstone C.J. was of opinion that the plaintiff was entitled to judgment. The parties agreed before them and before us that if judgment were given for the plaintiff the Court should assess the damages.

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(1) (1889) 23 Q. B. D. 598; [1892] A. C. 25.

(2) [1896] 1 Ch. 811; [1899] 1 Ch. 255.

(3) [1898] A. C. 1.

(4) [1901] A. C. 495, at p. 510.

(5) [1898] A. C. 1, at p. 94.

(6) (1853) 2 E. & B. 216.

(7) (1887) 36 Ch. D. 465.

(8) [1895] A. C. 587.

(9) (1843) 6 M. & G. 205.

(10) (1882) 21 Ch. D. 194.

The facts are stated in the judgments as reported below, and I need do no more than summarize them for the purpose of this judgment. The claim was for 50*l.* damages for wrongfully and maliciously inducing Messrs. Wigg & Wright to break their contract of apprenticeship with the plaintiff. The evidence for the plaintiff was that he had become bound by an indenture of apprenticeship to Messrs. Wigg & Wright, stonemasons, of Ipswich, whereby they undertook to teach him the trade of a mason, paying him wages of 15*s.* a week during a period of three years. Messrs. Wigg & Wright had in their capacity as masters agreed to certain working rules with the defendant society, one of which (6.) was as follows: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The plaintiff's father was a mason. The plaintiff was not a member of the society, and was twenty-five years of age when he entered into the indenture of apprenticeship. The defendant society in concert with the other defendants, on becoming aware that the plaintiff had been taken as an apprentice by Messrs. Wigg & Wright, took steps to enforce compliance by them with rule 6 as interpreted by the defendants by threatening in the language of their letter set out in Darling J.'s judgment: "If the man in question (the plaintiff) starts working at the trade, we are bound to protest against you for introducing an individual not of the trade; and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest with us in any way." This was in effect a threat that they would call out the workmen in Messrs. Wigg & Wright's employ, all of whom were members of the defendant society, and, as was explained by counsel, if so empowered, would be supported while off work out of the funds of the society. Messrs. Wigg & Wright disputed the construction placed by the defendants on rule 6, contending, and as I think rightly, that it did not extend to masons' sons. Feeling, however, that they could not resist the coercion brought to bear on them, they dismissed the plaintiff. It was not suggested before us that the acts complained of were not all done by the defendants in concert. The plaintiff has therefore lost the opportunity, which he was lawfully entitled to, of emerging from the position of a labourer at 15*s.* a week to that of a mason who may earn up to 35*s.*, and he has brought his action accordingly. No evidence was called for the defendants, and no proof given of assent by Messrs. Wigg & Wright to any rules other than those put in, of which rule 6 is one.

On these facts the learned county court judge held as follows: "I hold that the facts as proved and admitted before me fall short of giving any ground of action against the defendants. The defendants seem to me to have acted bonâ fide in the best interests of the society of masons, and not to have been in any way actuated by any improper motives. They gave a certain interpretation to rule 6 and acted upon it, and though their interpretation may or may not be correct, as it was honestly held, I do not consider they have acted improperly in their method of enforcing it."

On these facts the case seems to me to be clear. The plaintiff was entitled to the benefit of the contract which he had made, and that benefit he would have continued to enjoy but for the intervention of the defendants. The object of the defendants' intervention was to deprive him of that benefit. The facts leave no room for doubt as to that. He was not a member of their society, and was under no obligation, legal or moral, to conform to their rules. In these circumstances they conspired to enforce, by threats of a formidable character which they had the means of carrying into effect, a breach by his employers and instructors of the contract which the latter had with him; and the only justification they can suggest for this conduct is that Messrs. Wigg & Wright had come under an obligation to them, not perhaps legally enforceable, if not illegal, not to make such a contract as they had made with the plaintiff. But the justification to be of any avail must cover their whole conduct, the means they used as well as the end they had in view. As against Messrs. Wigg & Wright they had whatever rights within the law the rules assented to by Messrs. Wigg & Wright afforded them. But to combine to coerce them, by threats of the character I have described, to break their contract with the plaintiff was in my judgment an illegal act carried out by illegal means. They cannot be in a better position if the rules are unenforceable than they would have been had a breach of them given them a legal cause of action. But in such case how can they possibly justify taking the law into their own hands and compelling the opposing litigant by coercion to give effect to their view of a disputed obligation by breaking his contract with the plaintiff? Further, does not such conduct demonstrate that their object was to defeat the plaintiff's purpose of becoming a mason? Belief, however honest, that in what they did they were acting in the best interest of the society of masons could be no excuse for conspiring to deprive the plaintiff of the advantages of his contract. Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action: *Lumley* v. *Gye* (1); and a strong belief on the part of the persuader that he is acting for his own interests does not seem to me to improve his position in any respect. Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiff's expense by coercion. "That a conspiracy to injure — an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted": see per Lord Macnaghten in *Quinn* v. *Leathem* (1) and per Lord Brampton in the same case. (2) It seems to me, therefore, that this case stands wholly outside the debateable ground traversed in the discussion of *Allen* v. *Flood*. (3) The action of the defendants was as clearly malicious, or, if the phrase be preferred, "without just cause or excuse," as in *Lumley* v. *Gye* (4), which, as well as *Temperton* v. *Russell* (5), has been finally established in *Quinn* v. *Leathem* (6) to be a binding authority. "There are," says Lord Watson in *Allen* v. *Flood* (7), "in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case . . . . the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party." This view is approved by Lord Macnaghten and treated by him as embodying the opinion of the majority in that case. (8) The present case inevitably falls under one or other of those propositions, and I think within both. The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might in given circumstances be "just cause," or, in other words, suffice to negative malice. There was no relation

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(1) 2 E. & B. 216.

(1) [1901] A. C. 495, at p. 511.

(2) [1901] A. C. at pp. 528 et seq.

(3) [1898] A. C. 1.

(4) 2 E. & B. 216.

(5) [1893] 1 Q. B. 715.

(6) [1901] A. C. 495.

(7) [1898] A. C. 1, at p. 96.

(8) *Quinn* v. *Leathem*, [1901] A. C. 495, at p. 509.

between the defendants and either of the parties in this case at all analogous to those existing in the instances put of father and child, or doctor and patient, which I leave for solution when the case arises. The defendants have no higher immunity from legal obligations than any other members of the community, and if they have legal rights they can enforce them by legal means only. It is not at all necessary in this case to embark upon the question whether "without just cause" is a complete equivalent for what was meant in the common law by malice. I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it, nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion. See the weighty observations of Lord Brampton on this point in *Quinn* v. *Leathem*. (1) It is, however, very desirable to guard against the notion that if the act done be illegal "just cause" may still be averred to purge the wrong. For instance, where illegal means have been used to bring about the breach of a contract to the detriment of a party thereto, "just cause" cannot come into the discussion at all. The use of illegal means evidenced malice, and in this connection malice was not equivalent to "without just cause." The cause of intervention might be just, but the means used to enforce it might be illegal. The common law action threw the burden of proof on the plaintiff. It was not enough for him to shew that the defendant had brought about the breach of a contract between a third party and the plaintiff. He had to shew that it was done maliciously, and the burden of proving malice lay upon him. It was not a case of a primâ facie cause of action based on the fact that a breach of contract had been brought about to the detriment of the plaintiff, party thereto, by a stranger to the contract. The common law did not lightly extend rights arising out of contracts to and against persons not parties thereto, owing to the absence of privity (see the cases collected in the notes to *Pasley* v. *Freeman* (2)). Some nexus had to be established between the plaintiff and the stranger, and this was found in malice. Unless the plaintiff could shew this he failed to bring the stranger into such relations with him as to ground a cause of action, and, therefore, the burden was upon the plaintiff to prove a cause of action, not upon the defendant to justify. I think some confusion has crept into the discussions on this matter through want of sufficient regard to these elementary points.

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(1) [1901] A. C. 495, at p. 524.

(2) 2 Sm. L. C. 10th ed. 64.

I think the materials before us are sufficient to enable us to enter judgment, and I agree with the Lord Chief Justice that the defendants' appeal should be dismissed and the plaintiff's cross-appeal allowed, and judgment entered for the plaintiff for 50*l*.

STIRLING L.J. read the following judgment :—The evidence in this case establishes, in my opinion, that the defendants knowingly procured Messrs. Wigg & Wright to violate a contract which they had entered into with the plaintiff. In so doing the defendants acted without any improper motives; but I take the law to be as stated by Lord Macnaghten : "A violation of legal right committed knowingly is a cause of action, and . . . . it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference" : *Quinn* v. *Leathem*. (1) This proposition was not seriously questioned in argument, but it was contended on behalf of the defendants that there was a sufficient justification for their interference, because Messrs. Wigg & Wright had, previously to the contract with the plaintiff, entered into a contract with them, the defendants, which is said to be inconsistent with the contract between Messrs. Wigg & Wright and the plaintiff. Some difficulty appears to have arisen in the Divisional Court as to what the terms of this contract were; but at the hearing before us counsel on both sides agreed and invited us to decide the case on the footing that the terms of this contract are contained in a printed document put in evidence which purports to be "working rules agreed to and signed by the employers and the operative stonemasons of Ipswich and district," and to have been signed by (amongst others) Wigg & Wright, as employers, and the president and other officers of the defendant society. It was contended in argument that this agreement was illegal as being in restraint of trade. As at present advised, I am not satisfied that this is so; but in the view which I take it is unnecessary to decide the point, and I shall assume for the purpose of the present judgment that the agreement between Wigg & Wright and the defendants was in all respects valid and binding. The particular clause relied on is rule 6: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and step-sons." This I refer to as the first part of the rule. It proceeds: "Employers to have one apprentice to every four masons on an average." This I refer to as the second part of the rule. It is contended, on behalf of the defendants, that the first part of the rule prohibits employers from taking apprentices over sixteen years of age; and if this were the true construction of the rule, and it were applicable to persons in the position of the plaintiff, there would be, to say the least, a serious question whether the justification set up by the defendants was not made out. But whatever the true construction of this part of the rule may be, it does not, in my opinion, apply to the plaintiff. He was a mason's son, and by the terms of this part of the rule masons' sons are exempted from the operation of this part of it. As regards the second part, it is not well expressed; but it may be read as prohibiting employers from having more than one apprentice to every four masons. If this be the true meaning, Wigg & Wright violated it. It is not every violation of these rules which would justify the defendants in what they did. It appears to be plain from the letter, May 22, 1901, that the defendants' ground of complaint against Wigg & Wright was not that they had two apprentices when they ought to have had only one, but that they had taken the plaintiff as an apprentice when his age was between twenty-five and twenty-six. The objection that Messrs. Wigg & Wright had more than the proper number of apprentices might have been got over if they had entered into some arrangement by which the services of the other apprentice were transferred to another master. But the letter shews plainly that the defendants would not have been satisfied so long as the plaintiff was allowed to work at the trade. I think that the object of the defendants, as shewn by that letter, was to prevent Messrs. Wigg & Wright from giving the plaintiff the benefit of his contract with them, and I find nothing in the rules which entitled them to insist on that. It was said, however, that the defendants acted in good faith and honestly believed that the true construction of the rules was different from that which it appears to me to be. But, in the absence of fraud, good faith is not of itself a sufficient defence to an action founded on tort, though it may in some cases be an essential element of such a defence. If an action is brought for a trespass to land and the defendant justifies under an alleged right of way, judgment must go against him if he fails to establish the right, however honestly he may have believed in its existence. If an action is brought for the publication of defamatory matter and the defendant sets up that it was published on a privileged occasion, he will fail in his defence unless the privilege is established, however clear his good faith may be. I do not think that the present defendants occupy a better position than a defendant setting up privilege in an action for libel or slander; and as they fail to establish the existence of the contract on which they rely, I think that they fail in their defence. I desire to express no opinion on the important question whether, if the contract had been such as they believed it to be, they would have been justified in point of law in doing what they did. For these reasons, which appear to agree in substance with those given by the Lord Chief Justice in the Divisional Court, I think that the decision of that Court should be varied and judgment entered for the plaintiff.

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(1) [1901] A. C. 495, at p. 510.

COZENS-HARDY L.J. I agree. The judgment of the Master of the Rolls, which I have carefully read and considered, so completely expresses my own views that I do not desire to add a word.

Order varied.

Solicitors for plaintiff: *Field, Roscoe & Co., for Leighton & Aldous, Ipswich.*

Solicitors for defendants: *Shaen, Roscoe, Massey & Co.*

A. M.

BROOKS, Appellant; MASON, Respondent.

1902
Oct. 28.

Criminal Law—Sale of Intoxicating Liquors to Children—Vessels not properly Corked and Sealed—Mens rea—Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

By s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, every holder of a licence who knowingly sells or delivers, save at the residence or working place of the purchaser, any intoxicating liquor to any child under fourteen for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in the prescribed manner, shall be liable to penalties:—

Held, that the holder of a licence, who had delivered intoxicating liquor to a child under fourteen in a vessel not corked and sealed as the Act required, was guilty of an offence under s. 2, although he honestly believed when he delivered the liquor that the vessel was so corked and sealed.

Case stated by a metropolitan police magistrate.

The appellant appeared before the magistrate, sitting at the Clerkenwell Police Court, to answer an information preferred by the respondent, an inspector of police, alleging that the appellant, being the holder of a licence within the meaning of the Licensing Acts, 1872, 1874, and of the Intoxicating Liquors (Sale to Children) Act, 1901 (1), did unlawfully and knowingly deliver otherwise than at the residence or working place of the purchaser a certain description of intoxicating liquor to one James Cousins, a person under the age of fourteen years, for consumption off the premises, such intoxicating liquor not being sold or delivered in a corked or sealed vessel in a quantity less than one reputed pint for consumption off the premises only.

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(1) 1 Edw. 7, c. 27, s. 2: "Every holder of a licence who knowingly sells or delivers or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty not exceeding forty shillings for the first offence and not exceeding five pounds for any subsequent offence; and every person who knowingly sends any person under the age of fourteen years to any place where intoxicating liquors are sold or delivered or distributed, for the purpose of obtaining any description of intoxicating liquor, excepting as aforesaid, for consumption by any person on or off the premises, shall be liable to like penalties."

Sect. 5: "The term 'corked' means closed with a plug or stopper, whether it is made of cork or wood or glass or some other material.

"The expression 'sealed' means secured with any substance without the destruction of which the cork, plug or stopper cannot be withdrawn."

The following facts were proved or admitted at the hearing of the information:—

The appellant holds a licence to sell beer by retail for consumption off the premises in respect of a house in Essex Road, Islington. James Cousins, a boy about eleven years of age, had been sent to the appellant's premises to obtain some beer to be drunk off the premises, and there was delivered to him by the appellant one pint of beer in a bottle supplied by the appellant. The bottle was fitted with a glass stopper having round it a ring of cork. Over the top of the glass stopper from one side of the neck of the bottle to the other side the appellant, before delivery, stuck a gummed paper label previously moistened by him. The label was about three inches in length, and bore the words, "Caution. This label must not be tampered with." After affixing the label, a portion of sealing-wax was placed by the appellant on one side of the neck of the bottle, partly on the glass and partly over one end of the label. In that condition the bottle containing beer was delivered by the appellant to the boy, James Cousins. A police officer stopped the boy and took from him the bottle. The gum on the label was then wet. The police officer took hold of the label by the end opposite that on which the sealing-wax was, and turning it back detached the label, which came off the bottle intact, the sealing-wax also coming whole off the bottle with the label.

The magistrate found as facts that the bottle was corked and closed with the stopper, but that the paper label had not been secured with a substance without the destruction of which the stopper could not be withdrawn; also that the appellant knew that James Cousins was under the age of fourteen years, but that the appellant, at the time he delivered the bottle to James Cousins, honestly believed that he (the appellant) had in manner before mentioned by the gummed label and the sealing-wax secured the stopper in conformity with s. 5 of the Intoxicating Liquors (Sale to Children) Act, 1901.

It was contended for the appellant that the word "knowingly" in s. 2 of that Act referred to the knowledge of the seller as to the condition of the corking and sealing of the vessel in which the intoxicating liquor was sold or delivered as well as to the age of the person to whom it was sold or delivered, and that a person commits no offence against that section who honestly believes at the time of sale or delivery that the stopper of the vessel has been secured in accordance with the provisions of the Act.

The magistrate held upon the facts stated that the appellant had been guilty of an offence against the statute, and thereupon convicted him, and imposed a penalty upon him.

The question for the opinion of the Court was whether the magistrate came to a correct determination and decision in point of law.

Danckwerts, K.C. (*Bruce Williamson* with him), for the appellant. On the facts found by the magistrate no offence under the statute was committed by the appellant. The words in s. 2, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels," &c., are part of the statement of the offence, and the word "knowingly" in the earlier part of the section applies to them. That word governs the whole statement of the offence, as it clearly does in the second part of the section, which deals with the offence of knowingly sending a child under fourteen for the purpose of obtaining intoxicating liquors except in corked or sealed vessels. Mens rea is a necessary ingredient in every criminal offence unless the statute creating the offence clearly provides that it shall not be: see *Sherras* v. *De Rutzen* (1), judgments of Day and Wright JJ.

Craies (*H. Avory, K.C.*, with him), for the respondent. The magistrate's decision was right. The word "knowingly" in s. 2 does not apply to the words which are in question here.

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(1) [1895] 1 Q. B. 918.

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It applies to the sale or delivery, to the liquor supplied, and to the age of the person to whom the liquor is supplied. The gist of the offence is knowingly selling or delivering intoxicating liquors to a child under fourteen. The definition of the offence is complete when you come to the words "excepting such intoxicating liquors," &c., and those words are introduced by way of an exception which it lies upon the defendant to prove as a defence. The same applies to the second part of the section. Whether it is necessary to prove mens rea is a question of the construction of the statute in each case; the necessity may be negatived by express words or by necessary implication: *Reg.* v. *Tolson.* (1) *Sherras* v. *De Rutzen* (2) is only an instance in which the necessity to prove mens rea was affirmed with respect to the offence created by one section of the particular statute there in question. In *Cundy* v. *Le Cocq* (3), which is analogous to the present case, the necessity was negatived. On the true construction of s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, it is not necessary to prove mens rea where a person is proved to have in fact sold or delivered intoxicating liquor to a child under fourteen in a vessel not corked and sealed as required by the Act.

Danckwerts, K.C., in reply, referred to *Miller* v. *Justices of Dudley.* (4)

LORD ALVERSTONE C.J. This case raises a question of some difficulty. There can be no doubt that with respect to the great majority of criminal offences it is necessary to prove mens rea. But I doubt whether the particular difficulty here can be answered by simply applying that general principle. One must look at the statute creating the offence, and see what that offence is, and whether the words giving rise to the difficulty are intended to make an exception which, if proved, constitutes a defence, or are intended to be part of the description of the offence. [His Lordship read s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901.] In my opinion, what the statute intended to stop was the sale or delivery of intoxi-

(1) (1889) 23 Q. B. D. 168.
(2) [1895] 1 Q. B. 918.
(3) (1884) 13 Q. B. D. 207.
(4) (1898) 46 W. R. 606.

cating liquors to children under fourteen. Then the framers of the statute seem to have considered that there might be cases in which the sale or delivery was not a sale to the child for its own consumption, but a giving to the child intoxicating liquors for consumption by some other person. They therefore excepted intoxicating liquors sold or delivered in corked and sealed vessels as required by ss. 2 and 5. It was argued for the appellant that the words "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels," &c., form part of the description of the offence; that the word "knowingly" applies to the whole offence; and that the holder of a licence has committed no offence under the Act if he gives to a child under fourteen a bottle which he honestly believes to be properly secured as the Act directs. The other view is that the word "knowingly" does not apply to the exception, which is an exception from the offence, and constitutes a defence which must be proved in fact. I am of opinion, although not without doubt, that it would be altering the language of the statute, and departing from its intention, to read the word "knowingly" into the exception. The effect would be to say that a defendant need only prove by way of defence that he believed the vessel to be secured as the Act directs, although in fact it was not so secured. I think the Act only intended to except intoxicating liquors sold or delivered in vessels which were in fact properly sealed and secured. The exception specifies matters of defence which, if proved in fact, would negative the allegation that an offence had been committed. For these reasons I am of opinion that the learned magistrate's decision was right, and the appeal fails.

WILLS J. I am of the same opinion.

CHANNELL J. I am of the same opinion. I agree, too, that the point is doubtful.

Judgment for the respondent.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitors for respondent: *Wontner & Sons.*

W. A.

1902
Oct. 28.

ELLIOTT AND ANOTHER, APPELLANTS; RUSSELL, RESPONDENT.

Water—Supply by Urban Sanitary Authority—Water Rates, Summary Proceedings for enforcing Payment of—Limitation of Time—Demand—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 56, 57, 256—*Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17).

By virtue of certain provisions of the Waterworks Clauses Act, 1847, incorporated in the Public Health Act, 1875, payment of a rate or charge not exceeding 20*l.*, made by an urban authority for water supplied to premises within their district, may be enforced by summary proceedings before justices; and by s. 11 of the Summary Jurisdiction Act, 1848, where no time for making a complaint or laying an information is specially limited in the Act or Acts relating to each particular case, "such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." By s. 256 of the Public Health Act, 1875, "if any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing," he may be summoned to appear before a Court of summary jurisdiction, who may make an order for payment against him.

The appellants having failed to pay within fourteen days after demand in writing a sum claimed by an urban authority as the amount due for a water rate, the urban authority, within six calendar months after the expiration of the fourteen days, made a complaint and took out a summons under s. 256 to enforce payment:—

Held, that the water rate was a "rate made under this Act" within the meaning of s. 256 of the Public Health Act; that the matter of the complaint arose when the appellants failed to pay the amount claimed within fourteen days from the demand, and therefore that the complaint was made within the time limited by s. 11 of the Summary Jurisdiction Act, 1848.

CASE stated, under the Summary Jurisdiction Acts, by four justices of the borough and county of Southampton.

The following material facts were stated in the case.

The appellants were summoned to appear before the justices, sitting as a Court of summary jurisdiction, to answer an information and complaint made by the respondent charging them that they had wilfully not paid, and had refused to pay, the sum of 3*l.* 3*s.* 9*d.*, being charges for water supplied by meter for the quarter ending June 5, 1901, by the urban sanitary authority of the borough of Southampton under the Public Health Act, 1875, although the same had been duly demanded in writing before fourteen days before the date of the information and complaint.

On March 26, 1901, the appellants signed applications to the urban sanitary authority requesting a supply of water by meter, in accordance with certain terms and conditions then lately made by the urban authority, for trade, manufacturing, and other than domestic purposes at premises occupied by the appellants.

Those applications were agreed to by the urban authority.

The terms and conditions made by the urban authority provided (inter alia): "The charge for water supplied by meter shall be at the rate of 8*d.* per 1000 gallons, provided always that the minimum charge for a supply of water by meter to any premises shall be the amount which would be levied upon such premises if the same were supplied only for domestic purposes"; and "all charges for water or the hire of meters shall be paid quarterly."

On August 18, 1901, the respondent, who was one of the collectors of the mayor, aldermen, and burgesses of the county borough of Southampton acting by the council as the urban sanitary authority, made a demand in writing upon the appellants for payment of 3*l.* 3*s.* 9*d.*, being one quarter's minimum charge for water supplied to them for trade purposes by the urban authority for the quarter ending on June 5, 1901. The charge for the water actually supplied to the appellants during that quarter would, at the rate of 8*d.* per 1000 gallons, be very much less than the minimum charge. The appellants having failed to pay the sum demanded, a summons was on January 31, 1902, applied for by the respondent and issued by a justice of the peace requiring the appellants to appear before a Court of summary jurisdiction and answer the complaint. Particulars of the respondent's claim were given in the summons as follows: "The plaintiff claims that you the said defendant unlawfully have not paid and refuse to pay the sum of

3*l.* 3*s.* 9*d.* . . . . although the same hath been duly demanded of you in writing before fourteen days before the date hereof." On the hearing of the complaint it was contended for the appellants (inter alia) that the matter of the complaint arose at some time in June, 1901, and that, as the complaint had not been made within six months from the time when the matter of the complaint arose, the justices had no jurisdiction to entertain it.

The justices determined this contention in favour of the respondent, and made an order that the appellants should pay the sum claimed and a sum for costs.

The question for the opinion of the Court was whether their decision was right in law.

S. H. Emanuel, for the appellants. The justices had no jurisdiction to entertain the matter of the complaint, because the summons was not taken out within six months from the time when the matter of the complaint arose as required by s. 11 of Jervis's Act (11 & 12 Vict. c. 43), which applies here. That section provides that "in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." The matter of the complaint arose here when the sum claimed by the local authority became due from the appellants. Sect. 56 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), provides that where a local authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises, ascertained in the manner prescribed by the Act with respect to general district rates, and they may enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply, and the urban authority shall have the same powers for recovering water rents or other payments accruing under such agreements as they have for recovering water rates. Sect. 57 incorporates certain provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), including provisions "with respect to the payment and recovery of the water rates." Sect. 70 of the Act of 1847 provides that the rates shall be paid quarterly, and s. 74 provides that "if any person . . . . neglect to pay such water rate . . . . the undertakers . . . . may recover the rate due from such person, if less than 20*l.*, ... in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act." The manner in which damages not specially provided for are recoverable is found in s. 140 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which Act is incorporated with the Waterworks Clauses Act, 1847, by s. 85. Sect. 140 of the Railways Clauses Consolidation Act provides that they shall be ascertained and determined by two justices, and payment of the amount may be enforced by distress. No time being otherwise specially limited, s. 11 of 11 & 12 Vict. c. 43, applies: *East London Waterworks Co.* v. *Charles.* (1) The respondent cannot rely on the fact that the complaint was made within six months from the demand because no demand was necessary—*East London Waterworks Co.* v. *Kyffin* (2)—and there is no time limited by any statute for making the demand. If the view be adopted that proceedings to recover the sum due may be taken at any time so long as they are taken within six months after demand, it follows that a water authority might wait for years after the debt has become due before making any demand and may then recover it. That result cannot have been intended. By s. 256 of the Public Health Act, 1875, "if any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing," the defaulter may be summoned to appear before a Court of summary jurisdiction to shew cause why the rate in arrear should not be paid, and the Court may make an order for the payment of the same, &c. That section, however, does not apply to the recovery of water rates or charges, because the recovery of them is specially provided for by ss. 56 and 57; it is intended to apply to general district rates.

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(1) [1894] 2 Q. B. 730.

(2) [1895] 1 Q. B. 55.

Llewellyn Williams, for the respondent. The justices' decision was right. The matter of the complaint arose when the appellants failed to pay the water charge demanded. A demand was necessary because the sum claimed was in respect of a water charge, not of a water rate for water supplied by meter, and the appellants could not know the amount charged until it was demanded from them by the local authority. The ground of the decision in *East London Waterworks Co.* v. *Kyffin* (1) was that the appellant did know what was the amount of the water rate, and that case is, therefore, distinguishable. The principle applied in *Labalmondiere* v. *Addison* (2) ought to be applied here. Sects. 57 and 256 of the Public Health Act, 1875, must be read together. Sect. 256 applies as well to the recovery of water rates or charges as to the recovery of other rates, and the local authority were entitled to proceed under that section.

S. H. Emanuel, in reply, referred to *Hornsey Local Board* v. *Monarch Investment Building Society*. (3)

LORD ALVERSTONE C.J. In this case the only question we have to consider is whether or not the summons was taken out too late, so that the proceedings could not be maintained having regard to the six months' limitation of time in s. 11 of 11 & 12 Vict. c. 43 (Jervis's Act). The agreement between the appellants and the corporation was signed in March, 1901. It provided that all charges for water should be paid quarterly, and it gave the corporation the alternative of either charging the appellants according to the number of gallons of water supplied to them, or of charging on a minimum of the annual value of the premises, if the charge for the number of gallons supplied would not exceed that minimum. For water supplied during the quarter ending June 5, 1901, the corporation demanded the minimum charge, which came to 3*l.* 3*s.* 9*d.*, based on the annual value. Now, I do not wish to decide this case upon

(1) [1895] 1 Q. B. 55.

(2) (1858) 1 E. & E. 41.

(3) (1889) 23 Q. B. D. 149; 24 Q. B. D. 1.

the question whether or not the actual amount due and charged was known to the appellants. I have great doubt upon that point, because the facts are not sufficiently stated. Upon investigation it might turn out to be uncertain, as it appears to have been in some of the cases, and as Charles J. thought it was in *East London Waterworks Co.* v. *Kyffin* (1), whether the person charged knew, or had means of knowing, the actual amount he was going to be sued for. It is by no means clear that it would not turn out to be one of those cases, so that the doctrine of *Labalmondiere* v. *Addison* (2) would apply. I express no opinion upon that case, and I do not decide upon the ground of the decision in it. There is here one plain ground upon which, in my opinion, this case should be decided against the appellants. There was a demand made on August 18, 1901, and there was a complaint, made on January 31, 1902, clearly treating the matter as being a claim for money due and claimed under the authority of the Public Health Act, 1875. The summons taken out, which referred to the complaint, was a summons for default of payment. If that was a proceeding which could be taken, then the proceeding before the magistrates was a proceeding under s. 256 of the Public Health Act for non-payment within fourteen days after demand. It was contended for the appellants that s. 256 could not be relied on by the respondent because ss. 56 and 57 excluded the application of s. 256. Sect. 56 provides that "where a local authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises ascertained in the manner by this Act prescribed with respect to general district rates; moreover they may enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply, and shall have the same powers for recovering water rents or other payments accruing under such agreements as they have for recovering water rates." Sect. 57 incorporates a number of provisions of the Waterworks Clauses Act, 1847, and amongst them provisions "with respect to the payment and recovery of the water rates"; and

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(1) [1895] 1 Q. B. 55.

(2) 1 E. & E. 41.

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ELLIOTT v. RUSSELL.

Lord Alverstone C.J.

the result of the incorporation of those provisions seems to me to be that the water rate charged by the urban authority does become a rate made under the Act of 1875. It is true that there are other things—special remedies of cutting off water, certain rights of charging and of inspection, &c.—which are attracted to the Act by virtue of the incorporation; but the rate still does seem to me a "rate made under this Act" within the words of s. 256. It is none the less a rate made under the Act because it is enforceable by virtue of certain incorporated provisions of the Waterworks Clauses Act. If that be so, s. 256 applies. It provides that "if any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing," then the defaulter may be summoned to appear before a Court of summary jurisdiction. To that state of things we have to apply s. 11 of Jervis's Act, which enacts that where no time is or thereafter shall be specially limited for making a complaint or laying an information in the Act or Acts of Parliament relating to each particular case, "such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." On the face of the proceeding here it is clear that it was a proceeding in respect of the appellants' failure to pay within fourteen days after demand. That seems to me to have been the matter of complaint which arose. If that be so, the matter of the complaint did not arise until August 18, 1901, and these proceedings were in time. I do not think that the decision in *East London Waterworks Co.* v. *Kyffin* (1) is in conflict with our decision in this case, nor do I think that the Court intended to lay down any such general principle as was contended for—namely, that under no circumstances was any demand necessary. I do not understand the decision to go that length; and, if it did go that length, I should doubt whether sufficient consideration was given to the matter. Mathew J. in that case pointed out that the dispute between the parties had been known for

(1) [1895] 1 Q. B. 55.

some time, and the whole question was whether a formal notice was necessary before the man could be summoned; but I do not understand Mathew J. as laying down the proposition that under no circumstances is any demand necessary before the time begins to run. I think that the case was used in argument here for supporting propositions larger than the decision justifies. For these reasons I am of opinion that the magistrates were right in coming to the conclusion that the proceedings before them were in time, and that our judgment should be for the respondent.

WILLS J. I am of the same opinion. I wish to point out that the head-note in the report of *East London Waterworks Co.* v. *Charles* (1) makes it appear that the complaint must be made within six months from the time when the sum claimed became due. There is nothing in the judgment to that effect. The sum claimed had become due and had also been demanded more than six months before the complaint was made. The head-note is incomplete in not making that clear.

CHANNELL J. I agree.

Judgment for the respondent.

Solicitors for appellants: *Speechley, Mumford & Co., for Lamport & Bassett, Southampton.*

Solicitors for respondent: *Church, Adams & Prior, for the Town Clerk of Southampton.*

W. A.

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(1) [1894] 2 Q. B. 730.

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The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1902, will be as follows :—

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In the Second Series,
[1902] 1 K. B. [1902] 2 K. B. [1902] P.

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ACTION—*Cause of Action—Inducing Employer to break Contract—Justification for Interference—Prior Contract inconsistent with that of Employer.*

The plaintiff, who was a workman, entered into a contract by which he was apprenticed to his employers to learn certain work. A friendly society of workmen engaged in similar work protested to the employers against the engagement of the plaintiff as an apprentice, on the ground that it was a breach of one of the rules of the society which the employers had agreed to and signed, and they gave notice that, if the engagement was continued, they would call out the workmen who were working for the employers, and who were all members of the society. In consequence of this threat the employers refused to continue to teach the plaintiff under the terms of the deed of apprenticeship. In an action by him against the society and certain of the officers :—

Held, that the plaintiff had a good cause of action, to which the previous agreement between the society and the employers was no answer.

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The Sale of Food and Drugs Act, 1875, s. 6, enacts that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.* :—

Held, that a joint stock company incorporated under the Companies Act can be convicted of an offence under s. 6 :

Held, also, that a sale may be to the prejudice of the purchaser within s. 6, although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance, and quality demanded by him. The test is whether the sale would have been to the prejudice of a purchaser who had not that special knowledge. Pearks, Gunston & Tee, Limited *v.* Ward. Hennen *v.* Southern Counties Dairies Company - - - - - Div. Ct. 1

2. —— *Milk as taken from Cow deficient in Fat—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Article not of Nature, Substance, and Quality of Article demanded.*

It was proved on an information under the Sale of Food and Drugs Act, 1875, that the appellant, who was a milk-seller, supplied the respondent, an inspector under the Act, on being asked for new milk with a liquid which had been taken direct from the cow, and had not been tampered with or adulterated, but which, in consequence of the length of time which had elapsed since the cow had last been milked, was deficient in fat to an extent of 30 per cent., the remainder of the fat having been absorbed by the cow during the unduly long interval between the milkings :—

Held (by Lord Alverstone C.J. and Channell J., Darling J. dissenting), that the appellant was rightly convicted of having supplied the respondent with an article which was not of the nature, substance, and quality of the article demanded by him. Smithies *v.* Bridge
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The defendant contracted to sell his reversionary interest in property to R., who by deed assigned his interest under the contract to the plaintiff, and notice in writing of the assignment was duly given to the defendant. The defendant after the assignment to the plaintiff refused to perform his contract:—

Held, that the assignment was an assignment of a " legal chose in action " within s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiff was entitled to sue the defendant for damages for the breach of contract. TORKINGTON *v.* MAGEE - - - - Div. Ct. 427

2. —— *Debt or Chose in Action—Absolute Assignment (not purporting to be by way of Charge only)—Security for Debt—Instrument passing whole Right of Assignor—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A contractor for certain building works executed an instrument in writing, by which, in consideration of bankers' continuing a banking account with him, and by way of continuing security to them for all moneys due or to become due to them from him on the said account, he assigned to them all moneys due, or to become due, to him from the building owners under the building contract, and he thereby empowered them on his behalf, and in his name, to settle and adjust all accounts in connection with the works, to give effectual receipts for the moneys thereby assigned, which should discharge the person paying the same from being concerned to see to the application thereof, and also, if necessary, to sue for, or take such other steps as they might think necessary for enforcing payment of the moneys thereby assigned, and he further thereby undertook at their request and his own cost to do and execute all such further acts, deeds, and things as they might reasonably require for giving full effect to the security thereby created. Notice in writing of this assignment was given to the building owners:—

Held, that, the above-mentioned instrument having the effect of passing the whole right and interest of the assignor in the moneys payable under the building contract to the assignees by way of security, it was an absolute assignment (not purporting to be by way of charge only) within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6.

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BANKRUPTCY—*After-acquired Property—Contract of Employment made before Bankruptcy—Right of Bankrupt to Sue for Wrongful Dismissal—Intervention of Trustee—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44.

An undischarged bankrupt, employed as traveller for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for damages for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in the bankruptcy not having intervened in the action. BAILEY *v.* THURSTON & CO. Phillimore J. 397

2. —— *Bankruptcy Notice—Judgment Debt—Stay of Execution—Seizure by Sheriff and subsequent Withdrawal—No Return to Writ—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

When the sheriff has seized goods of a judgment debtor under a fi. fa., the judgment creditor cannot have another fi. fa. upon the judgment until a return has been made to the first, even though he has abandoned the seizure.

Miller v. *Parnell*, (1815) 6 Taunt. 370, is a decision to that effect, and the authority of that case has not been shaken by *Peploe* v. *Galliers*, (1820) 4 Moore, 163, or by *Lee* v. *Dangar*, [1892] 2 Q. B. 337.

But, if under a fi. fa. the sheriff has seized only goods not belonging to the judgment debtor, the principle of *Miller* v. *Parnell* does not apply, and in such a case there is nothing illegal or irregular in the issue of a second writ of fi. fa.

BANKRUPTCY—*continued.*

before any return has been made to the first. And in those circumstances there is nothing to prevent the judgment creditor from issuing a bankruptcy notice in respect of the judgment debt. *In re* A Debtor. *Ex parte* Smith **C. A. 260**

3. —— *Committal—Non-payment of Rates—Imprisonment—Receiving Order—Release—Jurisdiction—Legal Process—Punitive Order—Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *s.* 2—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 2—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 10, *sub-s.* 2.

A commitment under the Distress for Rates Act, 1849, s. 2, for one month, unless the money should be sooner paid, is a punitive order, and is not a legal process to enforce payment within s. 10, sub-s. 2, of the Bankruptcy Act, 1883, so as to enable the Court of Bankruptcy under that sub-section to discharge the debtor from prison on the ground that whilst in prison a receiving order has been made against him. *In re* James Edgcombe. *Ex parte* James Edgcombe **C. A. 403**

4. —— *Fraudulent Debtor — Prosecution by Trustee—Costs of Prosecution—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-s.* 3; *ss.* 16, 17—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 57, *s-sub.* 3; *s.* 166.

A trustee who prosecutes a debtor for offences committed against the bankruptcy laws without first obtaining an order of the Court for that purpose under s. 16 of the Debtors Act, 1869, will not, as a general rule, be allowed the costs of the prosecution out of the estate, even although the prosecution was expressly sanctioned by the committee of inspection. *In re* Howes. *Ex parte* White - - - **Wright J. 290**

5. —— *Fugitive Offender — Arrest — Offence committed in Foreign State — Bankruptcy of Prisoner pending Extradition—Property found on Bankrupt at date of Arrest—Retention by Police—Title of Trustee in Bankruptcy — Evidence of Crime—Order for delivery up of Property—"Competent Authority" to make Order—Belgian Extradition Treaty*, 1872, *art.* 12—*Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 9, 10.

When a fugitive offender, arrested in England on an extradition warrant for offences committed in a foreign State, becomes bankrupt in England pending the hearing of the charge, the property found on him at the date of his arrest vests in his trustee in bankruptcy, subject to this—that it may on his committal be ordered to be delivered up with him to be used as evidence of the crime at the trial; and, in such a case, the Secretary of State, in making the extradition order, should stipulate that when the criminal proceedings in the foreign State are concluded, the property shall be restored to the jurisdiction of the English Bankruptcy Court.

In such a case the competent authority in the first instance to decide what property found on the prisoner will serve as proof of the crime is the Court which hears the charge and makes the committal order. *In re* Borovsky & Weinbaum. *Ex parte* Salaman - - **Wright J. 312**

BANKRUPTCY—*continued.*

6. —— *Pledge of Chattels by Debtors for Loan repayable on a certain Day—Redemption on the stipulated Date—Delivery of Chattels by Pledgee with Notice of Act of Bankruptcy—Fraud of Debtors—Title of Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

On September 14, 1900, A. & Co. pledged chattels with B. as security for a loan to be repaid on October 26 following; and on September 27 they pledged other chattels with B. as security for a further loan to be repaid on November 11 following. On October 26 B. delivered the chattels first pledged to C., who produced a written authority from A. & Co. as purchaser, and paid him off; and on November 11 C. came again to B. with a written authority from A. & Co. as purchaser of the chattels under the second pledge, and by arrangement with B. extended the date of redemption to January 11, 1901, when he paid off B. and took delivery of the chattels. B. acted in good faith, but when paid on October 26 had notice of an available act of bankruptcy committed by A. & Co. on the previous October 6; and when paid on January 11 knew that a receiving order had been made against A. & Co. on January 9. C. was in collusion with A. & Co., and was fraudulent in all that he did: he sold the chattels and disposed of the proceeds. The title of the trustee in bankruptcy related back to the act of bankruptcy committed on the previous October 6, and he claimed from B. the value of the pledged chattels less the loans:—

Held, that B. was not liable for that, although not protected by s. 49 of the Bankruptcy Act, 1883, he was bound by his contract to deliver up the chattels when tendered on the date of redemption the amount due to him. *In re* Lawford & Lawrence. *Ex parte* The Trustee **Wright J. 445**

7. —— *Practice—Examination of Witness—Witness Abroad—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 27, 168—*Bankruptcy Rules*, 1886, *r.* 66.

The jurisdiction conferred on the Court by s. 27 of the Bankruptcy Act, 1883, to order that any person, who if in England would be liable to be brought before it under the section, shall be examined in Scotland or Ireland, "or in any other place out of England," must be read with some limitation, and does not extend to places abroad which are not within the jurisdiction of the British Crown. *In re* Drucker (No. 2). *Ex parte* Basden - - - - **Wright J. 210**

8. —— *Property of Bankrupt—Money advanced to Bankrupt for special Purpose—Payment to Creditor for withdrawal of Bankruptcy Petition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

After the presentation of a bankruptcy petition the debtor's solicitor paid 300*l.* to the petitioning creditor, on condition that the petition should be dismissed, and it was dismissed accordingly. The 300*l.* was advanced by the solicitor, and the debtor gave him a security for it. The debtor was soon afterwards adjudicated a bankrupt upon the petition of another creditor, and the trustee in the bankruptcy applied for an order that the creditor who had received the 300*l.* should refund it:—

Held, upon the evidence, that the 300*l.* was

BANKRUPTCY—*continued.*

impressed with a trust so that it could not be applied to any other purpose than in paying the creditor, and consequently that it did not form part of the bankrupt's general assets:

Held, therefore, that the case was governed by *In re Rogers*, (1891) 8 Morr. 243, and that the trustee was not entitled to recover the money.

Decision of Wright J., [1902] 2 K. B. 55, affirmed. *In re* Drucker (No. 1). *Ex parte* Basden - - - - - C. A. 237

9. —— *Transfer of Property for Past Debt—Act of Bankruptcy—Fraudulent Preference—Protected Transaction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 49.

A creditor who takes a transfer of substantially the whole of the property of his debtor in payment of a past debt, with notice that there are other creditors, cannot be said to be acting in good faith, and is therefore not entitled to the protection of s. 49 of the Bankruptcy Act, 1883; and such a transaction is an act of bankruptcy and primâ facie a fraudulent preference on the part of the debtor.

Shears v. *Goddard*, [1896] 1 Q. B. 406, distinguished. *In re* Jukes. *Ex parte* Official Receiver - - - - Wright J. 58

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—— *Reg.* v. *Stoddart*, [1901] 1 K. B. 177, followed
See Gaming. 2. 225

—— *Richards* v. *Hessick*, (1888) 57 L. J. (M.C.) 48 - - - - - 61
See London. 3.

—— *Rogers, In re*, (1891) 8 Morr. 243, applicable
See Bankruptcy. 8. 237

—— *Shears* v. *Goddard*, [1896] 1 Q. B. 406, distinguished - - - 58
See Bankruptcy. 9.

—— *Stoddart* v. *Argus Printing Co.*, [1901] 2 K. B. 470, dissented from - - 225
See Gaming. 2.

—— *Stoddart* v. *Hawke*, [1902] 1 K. B. 353, approved of - - - - 21
See Gaming. 3.

CASES—*continued.*

—— *White* v. *Fulham Vestry*, (1896) 74 L. T. 425, approved - - - 61
See London. 3.

CATTLE—Policy—Prohibition against entry into country of diseased cattle - - 694
See Insurance, Marine. 3.

CHARTERPARTY — Demurrage — Discharge of cargo—"As fast as the steamer can deliver" - - - - 199
See Shipping. 2.

CHILDREN.
See under Infant.

CHOSE IN ACTION—Contract to sell reversionary interest—Right of assignee to sue vendor for breach - - - - 427
See Assignment. 1.

—— Instrument passing whole right of assignor
See Assignment. 2. 190

COAL—Rise in value of coal after notice to treat, whether arbitrator can consider in assessing compensation - - 135
See Lands Clauses Acts. 1.

COMMITTAL — Jurisdiction — Judgment Summons, Application for—Existing committal order against co-defendant 283
See County Court. 2.

—— Non-payment of rates — Release — Jurisdiction—Punitive order - - 403
See Bankruptcy. 3.

COMPANY — *Director—Qualification Shares — Raising of Qualification—Vacation of Office—Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 3, *sub-s.* 2.

The plaintiff, a director of a limited liability company, held the necessary qualification under the articles of 50 shares. By a resolution of the shareholders in general meeting the capital of the company was increased, and at the same time the qualification for a director was raised to 250 shares. The plaintiff, in his capacity of director, was present at the board meetings at which the increase of capital and the raising of the directors' qualification were discussed and approved, and also at the general meetings at which the resolutions were passed and confirmed on April 4 and April 19, 1901, respectively. On April 20 the secretary of the company without the plaintiff's knowledge entered the plaintiff's name on the register for 200 shares, the number necessary to make up his qualification; the secretary's act was subsequently ratified by the directors other than the plaintiff at a board meeting on May 8. On April 22 the plaintiff, as required by s. 9 of the Companies Act, 1900, signed a copy of the share prospectus, in which his name appeared as a director, and on the following day the prospectus was issued to the public. On May 16 the plaintiff sent in his resignation of the office of director:—

Held, that upon the passing of the confirmatory resolution the plaintiff had not vacated his office of director within the meaning of s. 3, sub-s. 2, of the Companies Act, 1900, either by failing to obtain the necessary qualification or by ceasing to hold it:

Held, further, that the plaintiff had contracted to obtain the necessary qualification within a reasonable time either by transfer from existing shareholders or directly from the company; that a reasonable time for acquiring the qualification had elapsed when the plaintiff in his capacity of director signed the prospectus that was issued to the public, and that, there being then a binding contract to take the shares, the plaintiff could not get rid of his liability for calls by subsequently resigning his office of director. Molineaux *v.* London, Birmingham and Manchester Insurance Company - C. A. 589

2. —— *Directors' Remuneration — Fixing Time of Payment—Condition Precedent—Power to postpone Payment.*

Where the articles of association of a company provided that there should be allowed to each of the directors out of the funds of the company as a remuneration for his services a certain sum per annum to be paid at such times as the directors might determine:—

Held, that it was a condition precedent to the right of a director to sue for remuneration in respect of a year's service that the directors should have determined a time for payment thereof. Caridad Copper Mining Company *v.* Swallow - - - - C. A. 44

—— Contract — Assignability — Liquidation of company - - - - 660
See Contract.

COMPENSATION—Lands injuriously affected—Restrictive covenant - - 574
See Lands Clauses Acts. 2.

—— Rise in value of coal after notice to treat, whether arbitrator can consider in assessing compensation - - 135
See Lands Clauses Acts. 1.

—— Workmen's Compensation Act.
See Cases under Employer and Workman.

CONDITION—Precedent—Directors' remuneration—Fixing time of payment - 44
See Company. 2.

CONSPIRACY—Jurisdiction to allow withdrawal of plea of guilty before sentence 339
See Criminal Law. 1.

CONTINUATION CLAUSE—Validity of—Time policy - - - - 384
See Insurance, Marine. 5.

CONTRACT — *Assignability — Contract to supply Goods to Company—Liquidation of Company—Assignment of Contract—Rights of Contracting Company and of Assignee.*

The owner of land contracted with a company to supply them for fifty years with at least 750 tons of chalk per week, and so much more as they might require for their manufacture of cement upon their land, the chalk to be delivered in convenient daily quantities as required by the company by written notice given on the preceding day. The company, which had a small capital and was doing a comparatively

CONTRACT—*continued.*

small business, went into voluntary liquidation and transferred all its business and property, and purported to assign this contract to a second company, which had an extensive business, carried on at various places, and a large capital:—

Held, that though the second company could not maintain an action on the contract in their own right as assignees of the company with whom the contract was made, the contract was a subsisting one between the original parties to it, and had not been put an end to by the liquidation of the original company or the assignment to the second company, or by both those facts taken together.

Judgment of Mathew J., [1901] 2 K. B. 811, reversed. TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) AND IMPERIAL PORTLAND CEMENT COMPANY *v.* TOLHURST - - - C. A. 660

—— Action, Cause of—Inducing employer to break contract - - - 732
See ACTION.

—— Broker, Default of—Claim for difference between contract and "hammer" prices
See STOCK EXCHANGE. 653

—— By surveyor of highways for payment of money by his successors - - 48
See HIGHWAY. 1.

—— Insurance, Marine.
See Cases under INSURANCE, MARINE.

—— To sell reversionary interest — "Legal chose in action" - - - 427
See ASSIGNMENT. 1.

CONVEYANCE—Fraudulent—Deed of arrangement with creditor — Registration — Contents of affidavit - - 158
See FRAUDULENT CONVEYANCE.

CORPORATION — Oysters — Power to acquire lease of foreshore - - - 709
See FISHERY.

—— Sale by corporation—"Person"—Liability
See ADULTERATION. 1. 1

COSTS—Attendance of country solicitor—Taxation - - - - - 184
See PRACTICE. 1.

—— Appeal to quarter sessions—Payment by treasurer of county or borough - 101
See JUSTICES. 1.

—— Fraudulent debtor—Costs of prosecution by trustee - - - - 290
See BANKRUPTCY. 4.

—— Mandamus — Confirmation of bishop-elect —Objections on ground of doctrine—Jurisdiction - - - 503
See ECCLESIASTICAL LAW.

—— Remitted action—Sum "recovered in the action" - - - - 111
See COUNTY COURT. 1.

—— Security for costs — Application for new trial - - - - - 99
See PRACTICE. 2.

COUNSEL—Rule against justices—Refusal to do act relating to duties of office—Practice —Application by counsel - 488
See JUSTICES. 4.

COUNTER-CLAIM — Third-party notice — Indemnity over against person not party to action - - - - 481
See PRACTICE. 4.

COUNTY COURT—*Costs—Remitted Action—Payment by Defendant to Plaintiff after Action brought — Sum "recovered in the Action" — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

Sect. 116 of the County Courts Act, 1888, provides, with respect to actions brought in the High Court which could have been commenced in the county court, that if in an action founded on contract the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled to any costs of the action.

An action founded on contract having been brought in the High Court to recover 27*l.*, the defendants, after appearance, paid 8*l.* to the plaintiffs, no judgment or order of the Court having been given or made in respect of that payment. The action was subsequently remitted to the county court. In their particulars of claim in the county court the plaintiffs credited the defendants with the payment of 8*l.*, and claimed the balance—19*l.*; but the particulars did not shew that the payment had been made since action brought. The plaintiffs obtained judgment for 19*l.* in the county court, the judgment in form being for 19*l.*, and not for that sum in addition to the 8*l.* credited in the particulars:—

Held, by Lord Alverstone C. J. and Channell J., Darling J. dissenting, that, although it should have appeared on the proceedings that the plaintiffs had recovered 19*l.* in addition to the 8*l.* paid since action brought, they had in substance recovered in the action a sum not less than 20*l.*, and were, therefore, not disentitled to their costs by s. 116. PEARCE *v.* BOLTON
Div. Ct. 111

2. —— *Jurisdiction—Application for Judgment Summons — Existing Committal Order against Co-defendant—County Court Rules*, 1889, *Order* XXV.

In a county court action against three defendants upon a joint and several promissory note, judgment was given against all the defendants jointly. Upon default in payment of the judgment debt a judgment summons was issued against all three defendants, but service could only be effected on one, against whom a committal order was made but suspended on payment of certain monthly instalments. Application was subsequently made for leave to issue a judgment summons against one of the other defendants, but was refused by the county court judge on the ground that he had no jurisdiction to give leave to issue a judgment summons against one joint debtor while a committal order was still in existence against his co-defendant, to which no return had been made:—

Held, that the county court judge had jurisdiction to allow the summons to issue, and that a mandamus must issue to him to determine the

COUNTY COURT—*continued.*
application for leave upon the merits. The King *v.* Birmingham County Court Judge
Div. Ct. 283

—— Workmen's compensation—Appeal to High Court - - - - 165
See Employer and Workman. 1.

COUNTY COURT RULES, 1889, Order XXV.
See County Court. 2. 283

"COUPON COMPETITION"—Betting—Receipt of money elsewhere than at house 21
See Gaming. 3.

—— House used for betting - 216, 225
See Gaming. 1, 2.

COVENANT — Restrictive — Compensation — Lands injuriously affected - 574
See Lands Clauses Acts. 2.

CREDITORS—Bankruptcy practice.
See Cases under Bankruptcy.

—— Deed of arrangement—Registration—Contents of affidavit - - - 158
See Fraudulent Conveyance.

CRIMINAL LAW — *Conspiracy — Indictment against two or more for conspiring together—Plea of Guilty by one—Acquittal of the others—Withdrawal of Plea of Guilty before Sentence—Jurisdiction to allow Withdrawal—Crown Cases Act*, 1848 (11 *&* 12 *Vict. c.* 78).

On the trial of an indictment charging three persons jointly with conspiring together, if one pleads guilty and has judgment passed against him, and the other two are acquitted, the judgment passed against the one who pleaded guilty is bad and cannot stand.

A question arising upon a plea of guilty is a question arising "on the trial" within 11 & 12 Vict. c. 78, and the Court for the Consideration of Crown Cases Reserved has power to entertain a case reserving that question, and to make such order as justice may require.

Reg. v. *Brown*, (1889) 24 Q. B. D. 357, followed.

Reg. v. *Clerk*, (1866) L. R. 1 C. C. 54, disapproved.

Where a prisoner has pleaded guilty to an indictment, the Court has jurisdiction to allow him, before sentence, to withdraw his plea and plead not guilty. The King *v.* Plummer
C. C. R. 339

2. —— *Sale of Intoxicating Liquors to Children—Vessels not properly Corked and Sealed—Mens rea—Intoxicating Liquors* (*Sale to Children*) *Act*, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

By s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, every holder of a licence who knowingly sells or delivers, save at the residence or working place of the purchaser, any intoxicating liquor to any child under fourteen for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in the prescribed manner, shall be liable to penalties:—

Held, that the holder of a licence, who had delivered intoxicating liquor to a child under fourteen in a vessel not corked and sealed as the Act required, was guilty of an offence under s. 2, although he honestly believed when he delivered the liquor that the vessel was so corked and sealed. Brooks *v.* Mason - - Div. Ct. 743

—— Fugitive offender—Arrest—Bankruptcy of prisoner pending extradition - 312
See Bankruptcy. 5.

CROWN — Streets — Paving, &c., expenses — Liability - - - - 73
See Streets.

DAMAGES—Loss of market—Bill of lading 614
See Shipping. 1.

DEBENTURE — Payable to bearer — Usage — Conversion—Holder for value - 144
See Negotiable Instrument.

DEBT — Instrument passing whole right of assignor - - - - 190
See Assignment. 2.

DEBTOR—Committal—Non-payment of rates—Release—Jurisdiction—Punitive order
See Bankruptcy. 3. 403

—— Fraudulent—Costs of prosecution by trustee
See Bankruptcy. 4. 290

DEED OF ARRANGEMENT—Creditors—Registration—Contents of affidavits - 158
See Fraudulent Conveyance.

DELAY—Charterparty—Demurrage—Discharge of cargo—Strike clause - - 199
See Shipping. 2.

DEMURRAGE—Charterparty—"As fast as the steamer can deliver" - - 199
See Shipping. 2.

DESERTION—Ship—Seaman—Desertion which is also wilful disobedience - 239
See Shipping. 3.

DIRECTOR — Qualification shares — Raising of qualification—Vacation of office 589
See Company. 1.

—— Remuneration—Fixing time for payment—Condition precedent - - 44
See Company. 2.

DISMISSAL — Right of bankrupt to sue for wrongful dismissal - - 397
See Bankruptcy. 1.

DISOBEDIENCE — Ship — Seaman — Desertion which is also wilful disobedience 239
See Shipping. 3.

DISQUALIFICATION—Personal interest or bias—Licence—Renewal - - 363
See Licensing Acts. 1.

DISTRESS—Committal—Non-payment of rates — Release — Jurisdiction — Punitive order - - - - 403
See Bankruptcy. 3.

DOCK—Workmen's compensation - - 168
See Employer and Workman. 4.

ECCLESIASTICAL LAW — *Confirmation of Bishop-Elect—Objections on ground of Doctrine—Jurisdiction of Archbishop and Vicar-General*

ECCLESIASTICAL LAW—*continued.*

—*Mandamus—25 Hen. 8, c. 20—Costs in Mandamus.*

Upon the confirmation of the election of a bishop-elect by the archbishop or his vicar-general, there is no jurisdiction to entertain objections to the confirmation founded upon questions of doctrine, and a writ of mandamus will not lie to the archbishop or vicar-general to compel them to hear and determine such objections.

Reg. v. *Archbishop of Canterbury*, (1848) 11 Q. B. 483, discussed.

Semble, a mandamus will not lie to the archbishop to compel him, before proceeding to confirmation, to inform his mind of the fitness of the bishop-elect.

The archbishop has jurisdiction to require notices of objections to be delivered before the date of the confirmation, and to hold a preliminary meeting in chambers for the purpose of considering the objections.

Where the Crown is a party to the argument of a rule for a prerogative writ of mandamus, the Court has no jurisdiction to give costs either to or against the Crown. THE KING *v.* ARCHBISHOP OF CANTERBURY - - - **Div. Ct. 503**

—— Income tax—Incumbent of benefice—Grant by affiliated branch of Queen Victoria Clergy Sustentation Fund - **631**
See REVENUE. 2.

EMPLOYER AND WORKMAN—*Compensation—County Court—Order for Payment by Insurers in respect of Employer's Liability—Appeal to High Court—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 5—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

An appeal lies to the King's Bench Division against an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897. MORRIS *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY - - **C. A. 165**

2. —— *Compensation—Death resulting from the Injury—Natural or probable Consequence—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *Sched. I., clause* 1 (*a*).

Where a workman receives personal injury from an accident arising out of and in the course of his employment and death ensues, the death may be the result of the injury within the meaning of Sched. I., clause 1 (*a*), of the Workmen's Compensation Act, 1897, even though in fact it may not be the natural or probable consequence thereof. DUNHAM *v.* CLARE - - - - - **C. A. 292**

3. —— *Compensation — Engineering Work, Employment on — "Railroad" — Tramway — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A tramway laid along a public road is a "railroad" within the definition of engineering work in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and, therefore, employment on the construction, alteration, or repair of a tramway is an employment to which the Act applies. FLETCHER *v.* LONDON UNITED TRAMWAYS, LIMITED - - - **C. A. 269**

4. —— *Compensation — Factory — Dock, Wharf, or Quay—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

An accident happened in October, 1900, to a workman, while engaged in removing timber from a stack upon a piece of land, which was within the ambit of a system of docks belonging to a railway company, and which had been let by the company to timber merchants for the storage of timber. This piece of land was about forty yards from the water of a dock. Between it and the water ran the lines of a dock railway or tramway, but it was not separated from the adjoining wharf or quay space by any fence or other such physical barrier. Timber had sometimes been landed from the before-mentioned dock and brought to the said piece of land, but during the year 1900 all the timber stacked thereon had been landed from other docks forming part of the dock system more or less remote, and brought to the said piece of land by rail. On a claim by the workman for compensation under the Workmen's Compensation Act, 1897, the county court judge found as a fact that the place where the accident happened was a factory as being a dock, wharf, or quay within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

On appeal to the Court of Appeal:—

Held, that there was evidence to support his finding, and therefore the Court were bound by it.

Haddock v. *Humphrey*, [1900] 1 Q. B. 609, distinguished. KENNY *v.* HARRISON **C. A. 168**

5. —— *Compensation—Jurisdiction of County Court where Accident occurred—Injury by Accident in England—Employer resident in Scotland—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *2nd Schedule, clause* 9—*Workmen's Compensation Rules, r.* 15.

When a workman resident in England is injured by an accident occurring in England but his employer resides in Scotland, proceedings for compensation under the Workmen's Compensation Act, 1897, may be taken in the county court of the district in which the accident occurred, and service of the necessary notices may be effected by registered post. THE KING *v.* OWEN **Div. Ct. 436**

6. —— *Compensation—Review of Weekly Payment—Time from which Weekly Payment may be Ended, Diminished, or Increased — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., ss.* 1 (*b*), 12.

When an application to review a weekly payment made under the Workmen's Compensation Act, 1897, on the ground that the workman's incapacity has ceased, is brought before an arbitrator, he is not bound to treat the agreement for or award of a weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity had ceased when the application to review was made, or at any and what subsequent time before the hearing, and to make his award with reference to the date so determined. FRANCIS MORTON & Co. *v.* WOODWARD - - - - **C. A. 276**

7. —— *Compensation—"Scaffolding"—Ladder*

EMPLOYER AND WORKMAN—*continued.*

—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman was injured through an accident while employed on a house exceeding thirty feet in height, which was being repaired by means of a ladder. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the ladder was not a "scaffolding" within the meaning of the 1st sub-section of the 7th section of the Act:—

Held, that, it being impossible to say, as a matter of law, that the ladder must be "a scaffolding" within the meaning of the Act, the Court was bound by the finding of the county court judge. MARSHALL *v.* RUDEFORTH **C. A. 175**

8. —— *Compensation—Tortious Act of Fellow-Workman—Act having no relation to the Employment—Accident arising out of and in the course of the Employment—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

Where an accident happened to a workman, while engaged at his work, through the tortious act of a fellow-workman which had no relation whatever to their employment:—

Held, that the accident did not arise out of the employment within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 1. ARMITAGE *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - **C. A. 178**

9. —— *Compensation—Wages—Right of Workman receiving Compensation for Injury to Wages—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37).

A workman engaged at a weekly salary, who has claimed and received compensation under the Workmen's Compensation Act, 1897, in respect of partial incapacity for work resulting from injury received by him during the course of his employment, is not entitled to claim his wages during the time for which he has been incapacitated. ELLIOTT *v.* LIGGENS - **Div. Ct. 84**

—— Action, Cause of—Inducing employer to break contract - - - 732
See ACTION.

—— Negligence of Driver—Liability of proprietor - - - - 38
See HACKNEY CARRIAGE.

ENCROACHMENT — Leaseholds — Accretion to holding for benefit of lessor—Presumption - - - - - 318
See LIMITATIONS, STATUTE OF. 2.

ENGINEERING WORK—Workmen's compensation—"Railroad"—Tramway - 269
See EMPLOYER AND WORKMAN. 3.

EVIDENCE—Examination of witness abroad—Practice—Jurisdiction - - 210
See BANKRUPTCY. 7.

EXAMINATION—Witness abroad—Practice—Jurisdiction - - - 210
See BANKRUPTCY. 7.

EXTRADITION — Fugitive offender — Arrest — Bankruptcy of prisoner pending extradition - - - - 312
See BANKRUPTCY. 5.

EXTRAORDINARY TRAFFIC — Excessive weight - - - - **120**
See HIGHWAY. 2.

FACTORY — Workmen's compensation — Dock, wharf, or quay - - - **168**
See EMPLOYER AND WORKMAN. 4.

FISHERY—*Oysters—Depositing Oysters on Foreshore for purpose of Storage—Incident of Public Right of Fishing—Municipal Corporation—Power to acquire Lease of Foreshore—Sea Fisheries Act,* 1868 (31 & 32 *Vict. c.* 45), *s.* 41—*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 250.

The oysters in an oyster fishery were when freshly dredged unfit for consumption by reason of their being contaminated with impurities in the water, and the defendant, a fisherman, after dredging deposited his oysters in a particular portion of the foreshore indicated by boundary marks and left them there until they were ready for market:—

Held, that the defendant had no right, as incidental to the exercise by him of the public right of fishing, to appropriate a portion of the foreshore for the storage of his oysters to the exclusion of the rest of the public.

Where a municipal corporation, empowered by charter to hold lands, tenements and hereditaments, and goods and chattels, has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, it may lawfully take a lease of the foreshore of the fishery to enable it to carry out the purposes of the order.

Decision of Wills J., [1901] 2 K. B. 870, varied. TRURO CORPORATION *v.* ROWE **C. A. 709**

FOOD AND DRUGS—Sale of.
See Cases under ADULTERATION.

FORESHORE—Power of municipal corporation to acquire lease of—Oysters - - **709**
See FISHERY.

FRAUD—Fraudulent debtor—Costs of prosecution by trustee - - - **290**
See BANKRUPTCY. 4.

—— Pledge—Delivery of chattels by pledgee with notice of act of bankruptcy—Fraud of debtors - - - - **445**
See BANKRUPTCY. 6.

FRAUDULENT CONVEYANCE—*Deed of Arrangement with Creditors—Delaying Creditors—Registration—Contents of Affidavit*—13 *Eliz. c.* 5—*Deeds of Arrangement Act,* 1887 (50 & 51 *Vict. c.* 57), *s.* 6, *sub-s.* 1.

A deed of arrangement with creditors, which is intended to give effect to a bonâ fide scheme of arrangement, is not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserves a benefit to the debtor, nor because some of the creditors are intentionally excluded from its operation.

The registration of a deed of arrangement is not void because the affidavit of the debtor required by s. 6, sub-s. 1, of the Deeds of Arrangement Act, 1887, does not contain the names of all the creditors. MASKELYNE & COOKE *v.* SMITH **Div. Ct. 158**

FRAUDULENT PREFERENCE—Transfer of property for past debt—Act of bankruptcy—Protected transaction - - 58
See BANKRUPTCY. 9.

FREIGHT—General average sacrifice—Liability of chartered freight to contribute 681
See INSURANCE, MARINE. 2.

FUGITIVE OFFENDER—Arrest—Bankruptcy of prisoner pending extradition - 312
See BANKRUPTCY. 5.

GAMING—"*Coupon Competition*"—*House used for Betting—Betting Act*, 1853 (16 & 17 *Vict.* c. 119), *ss.* 1, 3.

The appellant was the occupier of an office in London and the proprietor of a newspaper, called *Football Chat*, published weekly at that office. T., the occupier of an office at Middelburg in Holland, conducted a "football coupon competition," that is to say, a scheme in which there was a promise by T. to pay a sum of money to such persons as should correctly guess the results of certain football matches, and should write their guesses on certain forms called coupons. The competition was advertised week by week in the appellant's newspaper, and the coupons were printed as part of the advertisement and could be procured at the appellant's office; they were, when filled up, to be cut out of the paper and sent with the entrance money to "*Football Chat*, Middelburg, Holland"; the names of the winners and the results of the competitions were also advertised in the appellant's newspaper. The appellant received for the insertion of these advertisements a sum considerably more than the charge for ordinary advertisements, but he had no other interest in the competition, nor had T. any interest in the newspaper. Upon the hearing of summonses against the appellant under the Betting Act, 1853, for (*a*) unlawfully permitting the office to be used by T. for the purpose of money being received by T. as the consideration for an undertaking to pay money on events or contingencies relating to the game of football, and (*b*) unlawfully keeping the office for the purpose of money being received by or on behalf of T. for the like consideration, a magistrate found that T., by permission of the appellant, used the appellant's office for the purpose of money being received by him as the consideration for his promise to pay money on the result of football matches, and that the appellant opened and kept the office for the purpose of the user by T.; he according convicted the appellant:—

Held, that there was evidence on which the magistrate could properly find that the office was used as an essential part of the machinery for receiving money for an illegal purpose, and that the conviction was right. MACKENZIE *v.* HAWKE
Div. Ct. 216

2. —— "*Coupon Competition*"—*House used for Betting—Information or Advice with respect to Bet or Wager—Advertisement—Betting Act*, 1853 (16 & 17 *Vict.* c. 119), *ss.* 1, 7—*Betting Act*, 1874 (37 & 38 *Vict.* c. 15), *s.* 3, *sub-s.* 1.

By s. 7 of the Betting Act, 1853, a penalty is imposed on any person publishing any advertisement whereby it is made to appear that any house, office, &c., is opened, kept, or used for the purpose of "making bets or wagers in manner aforesaid." The proprietor of a newspaper in England published an advertisement of an illegal football coupon competition conducted by a person resident abroad, the coupons for which were printed as part of the advertisement and were to be obtained at the office of the newspaper:—

Held, that the making of bets "in manner aforesaid" included all the modes of betting specified in s. 1 of the Betting Act, 1853, and was not limited to the class of betting described in the first branch of that section—that is, betting with persons "resorting to" the house, office, &c.—and that the proprietor of the newspaper was liable to be convicted upon a summons under s. 7.

By s. 3, sub-s. 1, of the Betting Act, 1874, a penalty is imposed upon the publication of an advertisement whereby it is made to appear that any person will on application give information or advice with respect to any bet or wager or any event or contingency mentioned in the principal Act—that is, the Act of 1853. The proprietor of the same newspaper published in it advertisements by persons offering to give information as to the probable winners of the football matches dealt with in the coupon competitions:—

Held, that the proprietor of the newspaper was liable to be convicted of an offence under s. 3, sub-s. 1, of the Betting Act, 1874.

Reg. v. *Stoddart*, [1901] 1 K. B. 177, followed.

Stoddart v. *Argus Printing Co.*, [1901] 2 K. B. 470, dissented from. HAWKE *v.* MACKENZIE (Nos. 1 & 2) - - - Div. Ct. 225

3. —— *Coupon Competitions — Receipt of Money elsewhere than at House—House used for Betting—Betting Act*, 1853 (16 & 17 *Vict.* c. 119), *ss.* 1, 5—*Gaming Act*, 1892 (55 & 56 *Vict.* c. 9), *s.* 1.

In order that a case may come within s. 1 of the Betting Act, 1853, it is sufficient that a house or office has been used by the occupier for an essential part of operations carried on for the purpose of money being received by him as the consideration for a promise by him to pay money on events or contingencies of or relating to horse-races or other games or sports, although the receipt of the money did not take place at that house or office.

Sect. 5 of the Betting Act, 1853, is not repealed by s. 1 of the Gaming Act, 1892.

Stoddart v. *Hawke*, [1902] 1 K. B. 353, approved of. LENNOX *v.* STODDART. DAVIS *v.* STODDART - - - - - C. A. 21

—— Discretion to deprive informer of portion of penalty - - - - 234
See JUSTICES. 2.

HACKNEY CARRIAGE—*Negligence of Driver—Liability of Proprietor—Relation of Master and Servant—London Hackney Carriages Act*, 1843 (6 & 7 *Vict.* c. 86), *ss.* 2, 28, 35—*Metropolitan Public Carriage Act*, 1869 (32 & 33 *Vict.* c. 115), *s.* 6.

The defendant and her son were partners in

HACKNEY CARRIAGE—*continued.*
the business of cab proprietors in London. A cab belonging to the partners, which was let in the ordinary way to a cabman, through his negligence came into collision with another vehicle, in which the plaintiff was riding, whereby injuries were occasioned to the plaintiff. The licence for the cab was taken out in the name of the defendant's son, who appeared on the register of licences as the proprietor thereof. In an action by the plaintiff against the defendant in respect of the injuries occasioned to the plaintiff as aforesaid:—

Held, that the action was maintainable, on the ground that the liability imposed in such cases on cab proprietors, by virtue of the Acts relating to hackney carriages, is not confined to licensed proprietors, or that the defendant must be considered as being a licensed proprietor in respect of the cab. Gates *v.* R. Bill & Son
C. A. 38

HIGHWAY—*Bridge, Construction of—Agreement between County Council and Surveyor of Highways for a Parish—Contract by Surveyor of Highways for Payment of Money by his Successors—Highways and Bridges Act*, 1891 (54 & 55 *Vict. s.* 63), *s.* 3.

A surveyor of highways for a parish, acting under the Highways and Bridges Act, 1891, s. 3, entered into an agreement with a county council by which he contracted, for himself and his successors, as highway authority for the parish, to contribute towards the building of a bridge a certain sum by two instalments, the second of which was to be payable after the expiration of his year of office:—

Held, that he had power to make such a contract under the before-mentioned enactment. Hertfordshire County Council *v.* Barnet Rural District Council - - **C. A. 48**

2. —— *Extraordinary Traffic — Excessive Weight—Person by or in consequence of whose Order such Weight has been conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

The defendant, being about to build a house, entered into a contract with a brick company to supply him with a quantity of bricks to be delivered at the place where he proposed to build. He gave no instructions as to the manner, time, or amount in which the bricks were to be delivered, and the company without his knowledge delivered them by means of a traction-engine and trucks, the excessive weight of which damaged the plaintiffs' roads to an extraordinary extent. In an action to recover the amount of the expenses to which the plaintiffs had been put in repairing the roads, the county court judge held that the defendant was not, within s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, the person "by or in consequence of whose order" such weight had been conducted over the plaintiffs' roads:—

Held, that the facts justified him in coming to that conclusion. Egham Rural District Council *v.* Gordon - - - **Div. Ct. 120**

INCOME TAX.
See Cases under Revenue.

INDEMNITY — Third-party notice — Counterclaim—Indemnity over against person not party to action - - - **481**
See Practice. 4.

INFANT—Sale of intoxicating liquors to children —Mens rea - - - - **743**
See Criminal Law. 2.

INFORMER—Discretion to deprive, of portion of penalty - - - - **234**
See Justices. 2.

INSURANCE, LIFE—Income tax—Deductions—Premium - - - - **255**
See Revenue. 4.

INSURANCE, MARINE — *Alien Enemy, Property of—Policy—Loss before Commencement of War—Seizure by Enemy's Government of Property of its own Subject in anticipation of War—Warranty against "Capture, Seizure, or Detention."*

Gold, the property of a mining company, which was incorporated and registered under the laws of the South African Republic, and carried on its business there, was insured with the defendants against (amongst other risks) "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines in the South African Republic to the United Kingdom; the policy contained a warranty against "capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." During transit the gold was removed from the train and taken possession of by the Government of the South African Republic on its own territory. The gold was taken in anticipation of an outbreak of war, which in fact occurred a few days afterwards, and the act of the Government in taking it was constitutional and in accordance with the law of the Republic; it was not restored to its owners. In an action upon the policy:—

Held, affirming the judgment of Phillimore J., [1901] 2 K. B. 919, that there had been a "seizure" of the gold within the meaning of the warranty, and that the defendants were, therefore, not liable on the policy.

Per Collins M.R.: The case also fell within the warranty against the consequences of warlike operations, whether before or after declaration of war. Robinson Gold Mining Company and Others *v.* Alliance Insurance Company
C. A. 489

2. —— *General Average—Sacrifice made on Outward Voyage of Ship in Ballast—Liability of Chartered Freight to Contribute.*

A ship was chartered to proceed to a foreign port, there load a cargo and bring it home, the chartered freight being payable on delivery of the cargo. While the ship was proceeding in ballast to her port of loading she grounded, and a general average sacrifice was made. She subsequently continued her voyage, loaded her cargo, delivered it, and received the freight:—

Held, that the chartered freight was liable to contribute to the general average sacrifice.

INSURANCE, MARINE—*continued.*

Judgment of Mathew J., [1901] 2 K. B. 861, affirmed. Steamship Carisbrook Company *v.* London and Provincial Marine and General Insurance Company - - - **C. A. 681**

3. —— *"Restraint of Princes and People"—Prohibition against Entry into Country of Diseased Cattle—Policy.*

The mere operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is not a restraint of princes or people within the meaning of a Lloyd's policy of marine insurance.

Semble, a warranty in a policy of marine insurance against "capture, seizure, and detention" operates to release the insurers from liability under the words "arrests, restraints, and detainments of kings, princes, and people" in the body of the policy. Miller *v.* Law Accident Insurance Company - **Bigham J. 694**

4. —— *Subject-matter of Insurance—Liability of Shipowner under Contract of Carriage—Suing and Labouring Clause—Applicability.*

A number of mules exceeding 20,000*l.* in value having been shipped on the plaintiffs' steamship for carriage under a contract which contained no clause exempting the plaintiffs from liability for loss of the mules through the negligence of the plaintiffs' servants, the plaintiffs effected an insurance with the defendant, an underwriter at Lloyd's, to protect them against "liability of any kind" to the owners of the mules up to 20,000*l.* owing to the omission of the negligence clause from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual suing and labouring clause. During the voyage the vessel stranded through the negligence of the plaintiffs' servants, and expenses were incurred by the plaintiffs in saving some of the mules and in attempting to save others which were lost. The plaintiffs sought to recover these expenses, not as a direct loss under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss:—

Held, that the suing and labouring clause was inapplicable to and formed no part of the contract of insurance, and that the plaintiffs were not entitled to recover in the action. Cunard Steamship Company *v.* Marten, Limited

Walton J. 624

5. —— *Time Policy for more than Twelve Months—Continuation Clause, Validity of—Risk or Adventure insufficiently defined—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 93.

A policy of marine insurance upon a ship for the period of twelve months contained the following continuation clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro râta daily premium." On the expiration of the twelve months the ship was abroad, and on her voyage home was lost. In an action on the policy:—

Held, that the policy was one entire contract of insurance for a time exceeding twelve months, and therefore invalid as being in contravention of s. 93, sub-s. 3, of the Stamp Act, 1891: and that, if the continuation clause could be regarded as a separate insurance, either for a voyage or time, it did not specify the particular risk or adventure insured sufficiently to satisfy the requirements of the sub-section; and therefore in either view the policy was invalid.

Judgment of Bigham J., [1901] 2 K. B. 567, affirmed. Royal Exchange Assurance Corporation *v.* Sjoforsakrings Aktiebolaget Vega

C. A. 384

INTERPRETATION ACT—Sale by corporation—"Person"—Liability - - **1**
See Adulteration. 1.

INTOXICATING LIQUORS—Sale to children—Vessels not properly corked and sealed—Mens rea - - - - **743**
See Criminal Law. 2.

JUDGMENT DEBT—Seizure by sheriff and subsequent withdrawal - - **260**
See Bankruptcy. 2.

JUDGMENT SUMMONS—Application for—Jurisdiction — Existing committal order against co-defendant - - **283**
See County Court. 2.

JURISDICTION — Committal — Non-payment of rates—Release—Punitive order - **403**
See Bankruptcy. 3.

—— Confirmation of bishop-elect—Objections on ground of doctrine - - - **503**
See Ecclesiastical Law.

—— Conspiracy — Jurisdiction to allow withdrawal of plea of guilty before sentence
See Criminal Law. 1. **339**

—— Examination of witness abroad—Practice
See Bankruptcy. 7. **210**

—— Judgment summons — Application for—Existing committal order against co-defendant - - - - **283**
See County Court. 2.

—— Summary—Water rates—Limitation of time
See Water. **748**

—— Workmen's compensation—Employer resident in Scotland—Jurisdiction of county court - - - - **436**
See Employer and Workman. 5.

JUSTICES—*Costs of Appeal to Quarter Sessions—Payment by Treasurer of County or Borough—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 32.

By s. 29 of the Alehouse Act, 1828, upon a successful appeal under the Act to quarter sessions from a decision of justices, the justices in quarter sessions are empowered to order the treasurer of "the county or place in and for which such justices whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment" to pay the respondent justices' costs.

A county borough had a separate commission of the peace, but not a separate Court of quarter sessions; it was not directly subject to the county rate, but under a financial adjustment made under s. 32 of the Local Government Act, 1888, it paid

JUSTICES—*continued.*

a fixed contribution towards the expenses of the county incurred in part on behalf of the borough, including the expenses of quarter sessions:—

Held, that the county borough, not having a separate Court of quarter sessions, and being liable to contribute to quarter sessions expenses, was not a place separate from the county, and therefore not a "place" within the meaning of s. 29 of the Alehouse Act, 1828; that the licensing justices had acted for the county, that their costs were costs of quarter sessions, and that the order of quarter sessions had, therefore, been wrongly made upon the borough treasurer, and should have been made upon the treasurer of the county. The King *v.* Warwickshire Justices Div. Ct. 101

2. —— *Penalty—Informer—Discretion to deprive Informer of Portion of Penalty—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 34—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 9.

Under s. 34 of the Metropolitan Police Courts Act, 1839, a metropolitan police magistrate has a discretion to deprive an informer of any share in a penalty inflicted under the Betting Act, 1853, although s. 9 of the latter Act expressly directs that one-half of the penalty is to be paid to the informer. Hawke *v.* Mackenzie (No. 3.) Div. Ct. 234

3. —— *Practice—Institution of Prosecution—Consent in Writing—Bread Act*, 1822 (3 *Geo.* 4, *c. cvi.*), *s.* 16—*Sunday Observation Prosecution Act*, 1871 (34 & 35 *Vict. c.* 87), *s.* 1.

The provision of s. 1 of the Sunday Observation Prosecution Act, 1871, that no prosecution or other proceeding shall be instituted for any offence committed under 29 Car. 2, c. 7 (The Sunday Observance Act, 1677), except by or with the consent in writing of the chief officer of police of the district or with the consent in writing of two justices of the peace or a stipendiary magistrate, has no application to prosecutions under s. 16 of the Bread Act, 1822, for selling or exposing for sale bread on the Lord's Day. The King *v.* Mead - - - - - . Div. Ct. 212

4. —— *Rule against Justices—Refusal to do Act relating to Duties of Office—Practice—Application by Counsel*—11 & 12 *Vict. c.* 44, *s.* 5.

A motion for a rule against justices under 11 & 12 Vict. c. 44, s. 5, must be made by counsel. *Ex parte* Wallace - - - C. A. 488

—— Betting.
See under Gaming.

—— Conspiracy — Jurisdiction to allow withdrawal of plea of guilty before sentence
See Criminal Law. 339

—— Licensing Acts.
See Cases under Licensing Acts.

—— Poor-rate — Waterworks — Assessment of intake - - - - 597
See Rates. 3.

—— Rates—General district rate—Appeal 244
See Rates. 1.

—— Sale of intoxicating liquors to children—Vessels not properly corked and sealed—Mens rea - - - - 743
See Criminal Law. 2.

JUSTICES—*continued.*

—— Ship—Seaman—Offences—Desertion which is also wilful disobedience - 239
See Shipping. 3.

—— Water rates—Summary jurisdiction—Limitation of time - - - 748
See Water.

LADDER—Workmen's compensation—"Scaffolding" - - - - 175
See Employer and Workman. 7.

LANDLORD AND TENANT—*Agricultural Holdings—Notice to Quit—Service—Registered Letter—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 28.

The provisions of s. 28 of the Agricultural Holdings Act, 1883, as to the service of "any notice, request, demand, or other instrument under this Act" are applicable to a notice to quit. Van Grutten *v.* Trevenen - C. A. 82

2. —— *Quiet Enjoyment, Implied Undertaking for—Breach—Agreement to Let.*

Upon the letting of a house for a year, an undertaking by the lessor for quiet enjoyment is to be implied from the mere relation of landlord and tenant.

Bandy v. *Cartwright*, (1853) 8 Ex. 913, and *Hall* v. *City of London Brewery Co.*, (1862) 2 B. & S. 737, followed.

Dicta of Kay L.J. in *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, dissented from.

Whether there has, or has not, been a breach of a covenant or undertaking for quiet enjoyment is a question of fact in each case. Budd-Scott *v.* Daniell - - - - Div. Ct. 351

—— Lease—Oysters—Municipal corporation—Power to acquire lease of foreshore 709
See Fishery.

—— Re-entry, Lessor's right of—Trespasser—Title against lessee—Surrender of lease
See Limitations, Statute of. 1. 304

LANDS CLAUSES ACTS—*Compensation—Arbitration—Preventing the Working of Coal Mines—Notice to treat—Rise in Value of Coal after Notice to treat, whether Arbitrator can consider in assessing Compensation.*

In an arbitration under the Lands Clauses Acts and the Waterworks Clauses Act, 1847, to assess the compensation payable to the owner of coal mines in respect of his being prevented from working seams of coal lying under and near to the reservoir of a waterworks company, the arbitrator is not entitled to take into consideration as an element in determining the amount of compensation to be paid a rise in the value of coal which has occurred between the date of the company's notice to treat and the making of his award.

Judgment of the King's Bench Division, [1901] 2 K. B. 798, reversed. *In re* Bwllfa and Merthyr Dare Steam Collieries (1891), Limited, and Pontypridd Waterworks Company - - - - - C. A. 135

2. —— *Compensation — Land injuriously affected—Restrictive Covenant—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

The breach of a restrictive covenant may be

LANDS CLAUSES ACTS—*continued.*
the ground for a claim for compensation, under s. 68 of the Lands Clauses Consolidation Act, 1845, by the owner of land for the benefit of which the restriction was imposed.

A railway company took, for the purpose of their undertaking, land which was subject to a covenant, entered into by their vendor, not to erect thereon "any building other than private dwelling-houses." The company erected a railway embankment on the land:—

Held, that the erection of the embankment was a breach of the covenant. LONG EATON RECREATION GROUNDS COMPANY *v.* MIDLAND RAILWAY COMPANY - - - **C. A. 574**

—— Poor-rate — Lands taken compulsorily — Deficiency in assessment - - **701**
See LONDON. 2.

LEASE.
See under LANDLORD AND TENANT.

LEASEHOLDS — Encroachment — Accretion to holding for benefit of lessor—Presumption - - - - - **318**
See LIMITATIONS, STATUTE OF. 2.

LETTER—Registered—Agricultural Holdings—Notice to quit—Service - - **82**
See LANDLORD AND TENANT. 1.

LICENCE.
See Cases under LICENSING ACTS.

LICENSING ACTS—*Licence—Renewal—Discretion of Justices—Preliminary Inquiry as to Number and Condition of Licensed Houses—Objection to Renewal taken by Justices or by their Direction—Disqualification from Adjudicating on Application—Personal Interest or Bias—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61)—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 26.

The attention of licensing justices having been called to the number of licensed houses in their district, they appointed some of their number a committee to investigate and report on the condition, position, and circumstances of the licensed houses. A detailed report was made, and a recommendation that all applications for renewal should be objected to, and notice given to each of the licensees to attend at the hearing. The report was adopted, and the justices at the annual licensing meeting objected through their chairman to the renewal of all the licences, and directed that notice should be given to each holder of a licence to attend at an adjourned meeting. At that meeting evidence was heard upon oath in each case, and the justices decided against the renewal of nine of the licences. On appeal against a decision of the King's Bench Division refusing an application for a mandamus to the justices to hold a further adjournment of the licensing meeting, and to hear and determine according to law the applications for the renewal of the nine licences:—

Held, that since the justices were entitled to take, or direct their officer or agent to take, objection to the renewal of licences, they were within their rights in making a preliminary investigation as to the licensed houses in their district; and the fact that they had done so, and adopted the report of the committee appointed for the purpose of making the investigation, did not debar them from hearing the applications and deciding on the question of renewal. THE KING *v.* HOWARD - - - **C. A. 363**

2. —— *Licence—Renewal—Value of Premises—Objection—Break in Continuity of Licence—Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 45.

In the case of an application for the renewal of a beerhouse licence, the immunity from objection that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, exists only where there has been a licence kept in existence continuously by renewals from the passing of the Act down to the date of the application.

Judgment of the King's Bench Division, [1901] 2 K. B. 740, reversed by the Court of Appeal, Collins M.R. and Mathew L.J.; Cozens-Hardy L.J. dissenting. IGOE *v.* SHANN **C. A. 467**

3. —— *Offences—Sale of Wine without Licence — Unlicensed Restaurant — Refreshment Houses and Wine Licences Act*, 1860 (23 *&* 24 *Vict. c.* 27), *s.* 19.

The keeper of a restaurant, carrying on business in premises not licensed for the sale of intoxicating liquors, was also a partner in a wine dealer's business carried on upon duly licensed premises in the neighbourhood. A customer, taking a meal in the restaurant, ordered a pint of claret from a waiter and gave him the money for it; the waiter went to the licensed premises, and there bought and paid for a pint bottle of claret which he brought back to the restaurant, where the customer consumed it. Upon the hearing of a summons against the keeper of the restaurant for selling wine without a licence, a magistrate found that there had been a sale at the restaurant of the wine by the defendant's waiter to the customer, and convicted the defendant:—

Held, that there was evidence upon which the magistrate might properly hold that the sale was at the restaurant, and that the conviction was right. PASQUIER *v.* NEALE - **Div. Ct. 287**

LIMITATIONS, STATUTE OF—*Action to Recover Land—Lease—Trespasser—Title against Lessee—Surrender of Lease—Expiration of Term—Lessor's Right of Re-entry—Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 34—*Period of Limitation*—"*Future Estate*"—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 2.

Where a trespasser on land let on lease has as against the lessee acquired a title under the Statutes of Limitations, and the lessee subsequently surrenders the lease to the lessor, the lessor has no right of re-entry, and the period of limitation does not begin to run, until the expiration of the term for which the lease was granted.

A reversion in fee simple expectant on the determination of a lease for years or lives is not a "future estate or interest" expectant on a particular estate within s. 2 of the Real Property Limitation Act, 1874. WALTER *v.* YALDEN **Div. Ct. 304**

2. —— *Leaseholds—Settlement by Lessee—Encroachment by Cestui que Trust on other Land included in same Settlement—Accretion to Hold-*

LIMITATIONS, STATUTE OF—*continued.*

ing for Benefit of Lessor—Presumption—Person claiming through a Trustee—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 7, 25.

Two adjoining pieces of land, herein referred to as the foundry and the stable, were in 1819 and 1831 respectively demised by the same lessor to the same lessee for ninety-nine years or three lives. The leases contained a covenant by the lessor to renew in certain events. In 1846 both pieces and certain other lands of the lessee were assigned by him to trustees to hold in trust for the lessee for life, and thereafter as to the foundry upon one set of trusts, and as to the residue upon another set of trusts. From some date prior to 1843, and down to the death of the lessee in 1848, two portions of the stable property were occupied by the lessee as part of and in connection with the business carried on by him on the foundry property. After his death these two portions continued to be so occupied by the cestuis que trust of the foundry, and the defendants, their successors, without any acknowledgment, down to the date of this action. In March, 1856, the foundry lease, and in August, 1856, the stable lease, were renewed, new leases on the same terms for ninety-nine years or three lives being granted to the trustees of the settlement. In July, 1890, a new lease of the foundry was granted to the then cestui que trust occupying the foundry and the two portions of the stable property. This lease was subsequently sold to the defendants. In 1894 a new lease of the stable was granted to the trustees, which was again renewed in 1898. This renewed lease was in 1901 sold to the plaintiffs, who on July 18, 1901, commenced this action, claiming to recover from the defendants the two portions of the stable property which had been occupied as part of the foundry property:—

Held, that the plaintiffs' claim was not barred; that at the date of the stable lease of August, 1856, the possession in law of the disputed portions was in the trustees so as to enable them to surrender them to the lessor and to obtain a regrant from him, and that the Statute of Limitations did not begin to run against the lessor in 1856, but only in 1894, on the determination of the stable lease of August, 1856; that the occupiers of the disputed portions were persons claiming through a trustee within s. 25 of the Statute of Limitations, 1833, and that the statute, therefore, did not run in their favour:

Held, also, that, assuming that the statute began to run in 1856 against the lessor, the disputed portions became an accretion to the property comprised in the foundry lease, and on the determination and surrender of that lease in July, 1890, i.e., within twelve years of the commencement of the action, the lessor acquired a new right of possession, there being nothing to rebut the presumption that the encroachment enured for the benefit of the lessor. EAST STONEHOUSE URBAN DISTRICT COUNCIL *v.* WILLOUGHBY BROTHERS, LIMITED - - **Channell J. 318**

LOCAL GOVERNMENT—Costs of appeal to quarter sessions—Payment by treasurer of county or borough - - **101**
See JUSTICES. 1.

LOCAL GOVERNMENT—*continued.*

—— Streets—Paving, &c., expenses—Liability—Crown - - - - **73**
See STREETS.

LOCOMOTIVES—Extraordinary traffic—Excessive weight - - - - **120**
See HIGHWAY. 2.

LONDON—*Building—Government—Transfer of Powers to Borough Councils—District Surveyors—Fees—Wooden Structures—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 84—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 5; *Sched. II., Part I.*

The transfer by the London Government Act, 1899, of the powers and duties of the London County Council as to licensing the erection of wooden structures under s. 84 of the London Building Act, 1894, to the borough councils established by the Act of 1899 does not operate as a transfer of the powers and duties of the district surveyors with respect to the supervision or inspection of those structures. Under the licence granted by a borough council a district surveyor has no powers, duties, or liabilities imposed upon him, unless he is named in the licence as the person to exercise supervision or inspection.

Wooden structures falling within s. 84 of the London Building Act, 1894, are works of which a district surveyor is entitled to notice under s. 145 of that Act, and as to which he may have duties of supervision and inspection independently of the terms of the licence of the borough council.

The right to receive the fees for supervision and inspection specified in the London Building Act, 1894, has not been transferred to the borough councils, nor has it wholly lapsed; a right to receive proper fees for duties necessarily performed remains in the district surveyor. WESTMINSTER CORPORATION *v.* WATSON.
Div. Ct. 717

2. —— *Rates—Poor-rate—Lands taken Compulsorily—Deficiency in Assessment to Poor-rate—Liability of Promoters of Undertaking—General Rate—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 10, *sub-s.* 2.

By s. 133 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), promoters of undertakings to whom that Act applies who become possessed of lands liable to be assessed to the poor-rate are to make good the deficiency in that rate caused by their taking or using the lands for the purposes of their works until their works are completed and assessed to the poor-rate:—

By s. 10, sub-s. 2, of the London Government Act, 1899, the general rate and the poor-rate are to be assessed, made, and levied together by the borough council as one rate, termed the general rate, which is to be assessed, made, collected, and levied as if it were the poor-rate:—

Held, that promoters who in the exercise of their statutory powers had compulsorily taken land in London since the coming into operation of the London Government Act, 1899, were only liable to make good the deficiency in so much of the general rate as represented the poor-rate or

LONDON—*continued.*
anything chargeable on that rate, and were not liable to make good the whole of the deficiency in the general rate. ISLINGTON CORPORATION *v.* LONDON SCHOOL BOARD - - Wright J. 701

3. —— *Streets—"New Street"—Widening of Old Street — Paving Expenses — Liability of Frontagers — Metropolis Management Acts*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105; 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 9, 215.

Where an old street repairable by the inhabitants at large, and having houses upon one side of it, is widened by the addition of a longitudinal strip of land of a substantial width upon the opposite side, the strip so added becomes itself a new street, and the expenses of paving the added strip, whether under the Metropolis Management Acts, 1855 and 1862, or the Public Health Act, 1875, must be apportioned solely among the owners of property abutting upon that strip, and not upon the owners of property abutting upon the old street.

Richards v. *Kessick*, (1888) 57 L. J. (M.C.) 48, and *White* v. *Fulham Vestry*, (1896) 74 L. T. 425, approved. PROPERTY EXCHANGE, LIMITED *v.* WANDSWORTH BOARD OF WORKS. C. A. 61

—— Betting—Discretion to deprive informer of portion of penalty - - - 234
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NEGOTIABLE INSTRUMENT—*Debenture payable to Bearer — Usage — Conversion — Sale by Broker on Stock Exchange—Holder for value.*

Certain debenture bonds, some issued by an English company in England and others by foreign companies abroad, and expressed to be payable to bearer, and not being promissory notes, were stolen from the plaintiff by his clerk. For the purpose of selling the bonds, the clerk employed a broker at Bradford, who instructed the defendants, brokers on the London Stock Exchange. The defendants, acting in good faith, entered into contracts for the sale of the bonds to jobbers. The bonds were then sent by the broker to the defendants, who handed them to the jobbers and remitted the price received to the broker. In an action by the plaintiff against the defendants for conversion of the bonds, it was proved that, by the usage of the mercantile world and of the Stock Exchange, bonds of the kind in question are treated as negotiable instruments transferable by mere delivery:—

Held, that the bonds were negotiable instruments, and that when the defendants received the bonds they became holders for value.

Bechuanaland Exploration Co. v. *London Trading Bank*, [1898] 2 Q. B. 658, followed.

Held, also, that it is not now necessary to tender evidence to prove that bonds of the kind in question are negotiable instruments, that being a fact of which the Court will take judicial notice. EDELSTEIN *v.* SCHULER & CO.
Bigham J. 144

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PRACTICE — *Costs — Examination of Witness before Trial—Attendance of Country Solicitor—Taxation—Costs as between Party and Party—Rules of Supreme Court, January*, 1902, *r.* 10. *Order* lxv., *r.* 27, *reg.* 29. *Appendix N, No.* 147.

Rule 10 of the Rules of Supreme Court, January, 1902, applies to taxation of costs both as between party and party and as between solicitor and client.

In an action upon a charterparty a witness, whose evidence was essential to the plaintiffs' case, was examined in London before the trial of the action. The plaintiffs' solicitor from Liverpool attended at the examination for the purpose of instructing counsel. The plaintiffs having succeeded in the action, upon the taxation of costs between party and party the taxing master allowed in respect of the solicitor's attendance as aforesaid an amount exceeding two guineas, the maximum allowance for such an attendance specified in Appendix N to Order lxv., No. 147:—

Held, that the taxing master had power to make the allowance which he made in the exercise of the discretion given to him by rule 10 of the Rules of Supreme Court, January, 1902. McIver & Co. *v.* Tate Steamers, Limited
C. A. 184

2. —— *Costs, Security for — Application for new trial.*

An order may be made for security for the costs of an application for a new trial.

Rule in *Heckscher* v. *Crosley*, [1891] 1 Q. B. 224, no longer to be followed. Wightwick *v.* Pope - - - - - C. A. 99

3. —— *Parties—Adding or substituting Plaintiff—Rules of Supreme Court, Order* xvi., *rr.* 2, 11.

Where an action has, through a boná fide mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff. Hughes *v.* Pump House Hotel Company (No. 2)
C. A. 485

PRACTICE—*continued.*

4. —— *Third Party — Counter-claim — Indemnity over against Person not Party to Action —Right of Plaintiff to issue Third-party Notice —Rules of Supreme Court, Order* xvi., *r.* 48.

The right given by Order xvi., r. 48, to a defendant, who claims to be entitled to contribution or indemnity over against any person not a party to the action, to issue a third-party notice, is applicable to the case of a plaintiff in an action against whom a counter-claim is raised by the defence, the plaintiff in such a case being in the position of defendant to the counter-claim. Levi *v.* Anglo-Continental Gold Reefs of Rhodesia, Limited. Taylor, Third Party
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See Employer and Workman. 3.

RATES—*Practice—Appeal—General District Rate—Inclusion in Estimate of Retrospective Charges more than Six Months old—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 210, 218, 269.

By s. 210 of the Public Health Act, 1875, an urban sanitary authority may make a general district rate, which may be made either prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate. By s. 218 the urban sanitary authority, before making a general district rate under the Act, is to cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, which estimate is to be entered in the rate-book and to be open to public inspection; with a proviso that the estimate is not to be deemed part of the rate nor in any way to affect its validity:—

Held, that the proviso to s. 218 does not operate to take away the general right of appeal to quarter sessions against a general district rate given by s. 269 of the Act, where it appears from the estimate that payment of a debt more than six months old is to be made out of the rate. SMITH *v.* SOUTHAMPTON CORPORATION **Div. Ct. 244**

2. —— *Procedure — Valuation List — Poor-rate — Metropolis — Quinquennial Valuation — Effect of Omission to give Notice of Increase of Valuation — Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 9, 45.

On the application for a distress warrant to recover the balance of a rate made by the appellants upon the respondents, it was contended that, as the appellants had failed to give the respondents notice of the increase in the rateable value of their premises as required by s. 9 of the Valuation (Metropolis) Act, 1869, the valuation list was not the valuation list for the time being in force in regard to them, and that they were only, therefore, liable in respect of a rate based on the rateable value of their premises as appearing on the previous valuation list:—

Held, that this was not an objection which could be taken on the application for the distress warrant, but must be raised by an appeal against the valuation list or against the rate. WESTMINSTER CORPORATION *v.* ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY, LIMITED - **Div. Ct. 125**

3. —— *Waterworks — Indirectly productive Works—Right to take Water from River—Assessment of Intake—Poor-rate.*

A waterworks company acquired by statute the right to take water from a river upon payment to the conservators of the river of certain sums of money. In exercise of that right they received a flow of water from the river over a piece of land on the river bank in their occupation called an "intake," where the water was measured by a gauge:—

Held, that in rating the company to the relief of the poor, the intake ought, beyond its structural value and its value as land, to be rated in an additional sum as having an enhanced value by reason of its fitness for the user made of it in taking water from the river into the channel of the company; but that the statutory payments

RATES—*continued.*

made to the conservators of the river for the water were not an element to be considered in arriving at the rateable value.

Decision of a Divisional Court, [1901] 2 K. B. 620, reversed. NEW RIVER CO. *v.* HERTFORD UNION - - - - - **C. A. 597**

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REVENUE — *Income Tax* — "*Annuity*" — *Purchase-money—Payment by Annual Instalments with Interest—Income Tax Acts* (5 & 6 *Vict. c.* 35; 16 & 17 *Vict. c.* 34), *Scheds. C and D.*

By a contract made in 1849 between the East India Company and the Great Indian Peninsular Railway Company, it was agreed that at the expiration of fifty years therefrom it should be lawful for the East India Company, on notice to the railway company, to purchase from them their railway at a price representing the full amount of the value of all the shares or capital stock of the railway company, and that if and when the East India Company should become liable under the contract to pay for the purchase of the railway it should be lawful for them, instead of paying a gross sum therefor, to declare, by notice to the railway company, their option to pay an "annuity," to commence from the time when the gross amount would be payable and to continue during the residue of a term of ninety-nine years, the rate of interest to be used in calculating the annuity to be determined as therein specified. At the expiration of the fifty years the Secretary of State for India, in whom the powers exercisable by the East India Company under the con-

REVENUE—*continued.*

tract had become vested, gave notice to the railway company of his intention to purchase the railway, and the price was determined and became payable. The Secretary of State thereupon duly declared his option to pay an annuity, and the rate of interest to be used in calculating the annuity was duly fixed. The annuity was paid half-yearly, each payment representing, as to a part of it, an instalment of the price paid for the railway, and, as to the residue, interest on the amount of the price for the time being unpaid. This arrangement was sanctioned by a local Act, which provided that the Secretary of State should pay the annuity to certain trustees appointed on behalf of the shareholders of the railway company:—

Held, that this was an "annuity" within the meaning of Sched. C of the Income Tax Acts, and, therefore, that income tax was payable upon the whole amount of each half-yearly payment, and not merely upon so much of it as represented interest.

Foley v. *Fletcher*, (1858) 3 H. & N. 769; 28 L. J. (Ex.) 100, distinguished. SCOBLE *v.* SECRETARY OF STATE IN COUNCIL FOR INDIA **Phillimore J. 413**

2. —— *Income Tax—Benefice, Incumbent of—Public Office or Employment of Profit—Perquisites or Profits accruing by reason of Office—Grant by Affiliated Branch of Queen Victoria Clergy Sustentation Fund—Income Tax Acts*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146; 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. E.*

The appellant, a beneficed clergyman, received for several years an annual grant of money from a diocesan branch affiliated to the Queen Victoria Clergy Sustentation Fund, a body incorporated with the object of providing adequate remuneration for the beneficed clergy for the work done by them; the fund was not intended to be merely a clerical charity. The funds of the diocesan branch were administered by a council whose aim was to raise the incomes of all benefices under 200*l.* per annum in value to that amount. The council did not take into consideration the personal circumstances of the particular incumbent, but the onus rested upon the applicant of deciding whether his own circumstances justified him in applying for a grant. The incumbent of a benefice of less than 200*l.* a year was not necessarily entitled to a grant, but the giving, withholding, continuance, and discontinuance of grants out of the funds were matters wholly within the discretion of the council. Where a benefice fell vacant during the year for which the grant was made, the grant was divided between the outgoing and incoming incumbent in proportion to the length of time for which each had been incumbent:—

Held (reversing the decision of a Divisional Court, [1901] 2 K. B. 761), that the grants received by the incumbent from the diocesan branch were "perquisites or profits accruing by reason of his office" within the meaning of the first rule contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sched. E, and that he was therefore liable to pay income tax under Sched. E upon them. HERBERT *v.* MCQUADE **C. A. 631**

REVENUE—*continued.*

3. —— *Income Tax — Company resident in United Kingdom holding preponderating Majority of Shares in Company Abroad—Control—*5 *&* 6 *Vict. c.* 35, *s.* 100, *Sched. D, Case* 1.

An English company carrying on business in the United Kingdom owned 98 per cent. of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors, &c., of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company:—

Held, that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax under the first case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the profits of the foreign company. KODAK, LIMITED *v.* CLARK - - - **Phillimore J. 450**

4. —— *Income Tax — Deductions—Premium on Life Insurance—Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 54.

The suppliant effected an insurance on his life for 1500*l.* upon the terms that the annual premium for the first seven years should be 66*l.*, and that the insurers should in each year advance to him by way of loan one-half of that sum, and that he should pay interest annually upon the amount advanced and be personally liable to repay the same, and that the advances and interest should be a first charge upon the policy. In each of the first three years the suppliant paid 33*l.* in cash in respect of the premium, and was debited with the remaining 33*l.* as a loan, and he paid interest annually in respect of those loans:—

Held, that the suppliant had paid an annual premium of 66*l.*, and was entitled to deduct that sum from the amount of his assessment to income tax, under s. 54 of the Income Tax Act, 1853. HUNTER *v.* THE KING - **Phillimore J. 255**

5. —— *Income Tax — Salary—Deductions—Contribution to Thrift Fund—Sum Payable or Chargeable by virtue of Act of Parliament—Income Tax Act*, 1842 (5 *&* 6 *Vict.* 35), *s.* 146—*Manchester Corporation Act*, 1891 (54 *&* 55 *Vict. c. ccvii.*).

By the Manchester Corporation Act, 1891, the Manchester Corporation were empowered to establish a fund for the encouragement of thrift among the officers and servants of the corporation, and to make certain proportionate contributions towards the fund. By a scheme approved by the corporation under the Act, it was provided that persons entering the service of the corporation after the date of the Act should contribute to the fund a certain percentage of their salaries, to be deducted from time to time by the corporation from the salaries, and that no such person should cease to contribute to the fund while in the service of the corporation; and it was further provided that any person who at the date of the Act was in the service of the corporation might, by an application in writing, be admitted to the benefit of the fund, and become and continue to be a contributor to it upon the same terms and conditions as if he had entered their service since that

REVENUE—*continued.*
date. The appellant, who was in the service of the corporation at that date, applied in writing to be admitted to the benefits of the fund, and became and continued to be a contributor to the fund of a certain proportion of his salary. He claimed to deduct this sum from the amount on which he was assessed to income tax under Sched. E, by virtue of the first rule of s. 146 of the Income Tax Act, 1842, by which duty is payable on salaries, &c., "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament":—

Held, that the amount contributed by the appellant to the fund was not payable by virtue of any Act of Parliament, but by virtue of the scheme and of the appellant's application to be admitted to the benefits thereof, and, therefore, that he was not entitled to the deduction claimed.

Beaumont v. *Bowers*, [1900] 2 Q. B. 204, distinguished. HUDSON *v.* GRIBBLE (SURVEYOR OF TAXES) - - - - Phillimore J. 298

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SHIPPING—*Bill of Lading—Breach of Shipowner's Obligation to Shipper—Carriage of Goods destined for Enemy—Seizure of Ship—Delay in Delivery of Shipper's Goods—Damages—Loss of Market.*

The carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers is a breach of duty towards them, and the shipowner is liable for damages for delay in delivering their goods at the port of destination if the ship is seized and detained by reason of having enemies' goods on board.

There is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea. DUNN *v.* BUCKNALL BROTHERS. DUNN *v.* DONALD CURRIE & CO. - C. A. 614

2. —— *Charterparty—Demurrage—Discharge of Cargo—"As fast as the Steamer can deliver"—Conditions at Port of Discharge that delay Discharge—Receiver of Cargo doing all he could be reasonably expected to do—Liability for Delay—Strike Clause—Effect on Construction of Charterparty.*

A charterparty contained a clause, "The cargo to be loaded and discharged with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports"; and also a clause, "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics, the time for loading or discharging shall not count during the continuance of such strike or lock-out or epidemic." The vessel arrived at the port of discharge, but from the crowded state of the dock to which she was ordered delay occurred in bringing her into it, and further delay in getting a berth when she was in the dock, and in unloading. At the trial of an action by the shipowner against the indorsees of a bill of lading, which incorporated the terms of the charterparty, for demurrage for detention of the ship, it was proved that the vessel could be discharged in five days if nothing came in the way of the discharge, that the time occupied in the discharge exceeded five days, and that the defendants did all that they reasonably could, under the circumstances, to discharge the cargo. Judgment was given for the defendants. On appeal:—

Held, that the expression "as fast as the steamer can deliver" did not import the same obligation as to the discharge of the cargo as if five days had been named, and that the defendants, having discharged the cargo within a time which was reasonable under the existing circumstances, were not liable for the delay:

Held, also, that the insertion of the strike clause in the charterparty did not affect the construction of the clause relating to the dis-

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charge of the vessel. HULTHEN *v.* STEWART & Co. - - - - - - C. A. 199

3. —— *Offences—Ship—Fishing Boat—Seaman—Desertion or Absence without Leave—Wilful Disobedience—Desertion which is also Wilful Disobedience—Punishment—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 376, *sub-s.* 1.
A seaman may be convicted of the offence of wilfully disobeying a lawful command of the master, under s. 376, sub-s. 1 (*d*), of the Merchant Shipping Act, 1894, although the act of disobedience amounts to the offence of desertion or absence without leave under (*a*) or (*b*) of s. 376, sub-s. 1. EDGILL *v.* J. & G. ALWARD, LIMITED - - - - Div. Ct. 239

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A member of the Stock Exchange who has become a defaulter may, notwithstanding that the liquidation is proceeding, be sued in respect of claims which are being dealt with in the liquidation.

A broker, who has become a defaulter on the Stock Exchange, can be sued for the difference between the contract and "hammer" prices in a transaction which has been carried out and settled by his client with the jobber through another broker, inasmuch as by the practice of the Stock Exchange the jobber has to pay to the official assignee the amount of that difference which he receives from the client.

Judgment of Mathew J., [1901] 2 K. B. 844, affirmed. Ratcliff & Dealtry *v.* Mendelssohn.
C. A. 653

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The Crown, not being named in s. 150 of the Public Health Act, 1875, is not bound by its provisions, and is not liable under that section to pay in respect of property owned and occupied for the purposes of the Crown any expenses of paving, &c., a street on which that property abuts.

Land acquired and occupied by a volunteer corps for military purposes, and held under and subject to the provisions of the Volunteer Act, 1863, and the Military Lands Act, 1892, and vested in the commanding officer for the time being of the corps, is land owned and occupied for the purposes of the Crown. The commanding officer, therefore, is not liable in respect of it for any expenses incurred by a local authority under s. 150. HORNSEY URBAN DISTRICT COUNCIL *v.* HENNELL - - - - **Div. Ct. 73**

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By virtue of certain provisions of the Waterworks Clauses Act, 1847, incorporated in the Public Health Act, 1875, payment of a rate or charge not exceeding 20*l.*, made by an urban authority for water supplied to premises within their district, may be enforced by summary proceedings before justices; and by s. 11 of the Summary Jurisdiction Act, 1848, where no time for making a complaint or laying an information is specially limited in the Act or Acts relating to each particular case, "such complaint shall be

WATER—*continued.*
made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." By s. 256 of the Public Health Act, 1875, "if any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing," he may be summoned to appear before a Court of summary jurisdiction, who may make an order for payment against him.

The appellants having failed to pay within fourteen days after demand in writing a sum claimed by an urban authority as the amount due for a water rate, the urban authority, within six calendar months after the expiration of the fourteen days, made a complaint and took out a summons under s. 256 to enforce payment:—

Held, that the water rate was a "rate made under this Act" within the meaning of s. 256 of the Public Health Act; that the matter of the complaint arose when the appellants failed to pay the amount claimed within fourteen days from the demand, and therefore that the complaint was made within the time limited by s. 11 of the Summary Jurisdiction Act, 1848. ELLIOTT *v.* RUSSELL - - - - **Div. Ct. 748**

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

BIBL. LONDIN